Supreme Court, U. S.
FILED
MAR 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant.

VS

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

Richard J. Dowdall
JOHNSON, HAYES & DOWDALL, LTD.
250 N. Church
Tucson, Arizona 85701
(602) 624-8741

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO._____

JOE JACOBSON,

Appellant.

VS

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

Richard J. Dowdall
JOHNSON, HAYES & DOWDALL, LTD.
250 N. Church
Tucson, Arizona 85701
(602) 624-8741

TABLE OF CONTENTS

	PAGE
Opinion Below.....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved.....	5
Questions Presented.....	9
Statement.....	10
How the Federal Questions Were Raised and Decided Below.....	13
The Federal Questions are Substantial.....	22
I. Resolution Number 9502 and Rule I, Mayor and Council Rules and Regulations (1968), Enacted Pursuant to Tucson City Charter, Chapter IX, Sec. 4, Deny Appellant's Fourteenth Amendment Right to Due Process in the Deprivation of Property or Liberty In the Form of Public Office By Allowing Reconsideration and Rescission of Appointment to Office Without Notice or Opportunity to be Heard.....	25

PAGE

II. Tucson City Charter, Chapter XI, Sec. 8, Which Allows Immediate Appointment and Effectiveness of Appointment In Cases Where An Emergency Is Found to Exist By the Council and A Thirty Day Delay Where No Emergency Is Found to Exist Deprives Appellant of Equal Protection of the Laws as Applied In this Case..... 33

Conclusion 35

Appendices:

Appendix A - Opinion of the Supreme Court of Arizona A1

Appendix B - Resolution Number 9496 ..... A25

Appendix C - Letter of Appointment A27

Appendix D - Resolution Number 9502 ..... A28

Appendix E - Letter of Rescission A30

Appendix F - Resolution Number 9503 ..... A31

PAGE

Appendix G - Findings of Fact, Conclusions of Law and Judgment of the Superior Court of Arizona, In and For Pima County A32

Appendix H - Denial of Motion For Rehearing A43

Appendix I - Notice of Appeal A45

TABLE OF CASES

PAGE

Atlantic Coast Line Railway v. Goldsboro, 232 U.S. 548 (1914)..... 4

Arnett v. Kennedy, 416 U.S. 134 (1974)..... 24, 28

Baxtrom v. Herold, 383 U.S. 107 (1966)..... 33

Bishop v. Wood, 96 SCt. 2074 (1976)..... 31

Board of Regents v. Roth, 4080, 5564 (1972)..... 26, 31

City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951)..... 18

City of Tucson, et al v. Joe Jacobson, ____ Ariz. ___, 558 P.2d 686 (1976)..... 1

Gulf Colorado and Santa Fe Ry v. Ellis, 165 U.S. 150 (1897)..... 33

Humphrey's Executor v. United States, 295 U.S. 602 (1935).. 32

PAGE

Joint Anti-Fascist Committee vs. McGrath, 341 U.S. 123 (1951)..... 26

Keekow v Village of Chenequa, 342 F. Supp. 494 (1972)..... 32

Kearney v. Med-Century Co., 22 Ariz. App. 190, 526 P.2d 169 (1974)..... 30

Mansfield v. O'Brien, 271 Mass. 515, 171 N.E. 487 (1930)..... 21

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)..19,24,26,28,30

Meyers v. United States, 272 U.S. 52 (1926)..... 32

Morris v. Cashmore, 253 App. Div. 657, 3 NYS2d. 624 (1938).... 21

Norton v. Blaylock, 285 F. Supp. 659 (1968)..... 32

PAAC v. RIZZO, 502 F.2d 306 (1974). 31

Peacock v. Board of Regents of the Universities and State Colleges of Arizona, 510 F.2d 1324 (9th Cir. 1975)..... 28

Perry v. Sinderman, 408 U.S. 593 (1972).....26, 29

Reinman v. Little Rock Arkansas, 237 U.S. 171 (1915)..... 4

PAGE

Skinner v. Oklahoma, 316 U.S. 593 (1942)..... 33

State ex rel Pierce v. Hardin, 163 Tenn. 471, 4 S.W.2d 924 (1931)..... 32

State v. Miller, 62 Ohio St. 436, 47 N.E. 227, 78 Am. St. Rep. 732 (1900)..... 21

State v. Tyrell, 158 Wisc. 425, 149 N.W. 280 (1914)..... 21

United States v. Balling, 144 U.S. 1 (1841)..... 4

United States v. Charles LeBaron, 19 How. (60 U.S.) 73 (1856)..... 26

Zucht v. King, 260 U.S. 174 (1922).. 4

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution..... 5, 22, 23, 25, 32

Resolution Number 9496 of the Tucson City Council..... 2. 10, 15, 16

PAGE

Resolution Number 9502 of the Tucson City Council..... 1, 2 3, 5, 11, 12, 14, 15, 18, 21, 22, 25

Resolution Number 9503 of the Tucson City Council..... 12, 34

Rule I, Mayor and Council Rules and Regulations (1968)..... 1 4, 7, 9, 17, 18, 22, 25, 31

Rule 47(e)(2), Rules of the Supreme Court of Arizona..... 3

Tucson City Charter, Chapter V, Sec. 4..... 31

Tucson City Charter, Chapter V, Sec. 4.1..... 28

Tucson City Charter, Chapter IX, Sec. 4.....1, 4, 7, 9

Tucson City Charter, Chapter XI, Sec. 8.....1, 4, 7, 9, 33, 35

28 U.S.C. §1257(2)..... 1

42 U.S.C. §§1981 and 1983..... 13

OTHER AUTHORITIES CITED

Annotation, Appointments to Office-Reconsideration, 89 A.L.R. 132... 31

PAGE

2 Dillion, Municipal Corporations (5th Ed.) §529..... 27

3 McQuillon, Municipal Corporations (3rd Ed.) §1286..... 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

JOE JACOBSON,

Appellant,

VS

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, The Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at ___ Ariz.___, 558 P.2d 686 (1976) and is set forth in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257(2), this being an appeal which draws into question the validity of Resolution Number 9502 of the Tucson City Council, Rule I, Mayor and Council Rules and Regulations adopted pursuant to Tucson City Charter, Chapter IX, Sec. 4, and Tucson City Charter Chapter XI Sec. 8, on the grounds that they are repugnant to the Constitution of the United States.

Appellant was appointed City Magistrate of the City of Tucson on April 28, 1975, by Resolution Number

#9496, (set forth in Appendix B), which had no emergency clause, but which provided that Appellant was appointed for the term commencing April 29, 1975 to and including April 28, 1977. On May 2, 1975, Appellant was notified of his appointment by letter (set forth in Appendix C). On May 5, 1975 the City Council attempted to repeal or rescind Resolution No. 9496, by passing Resolution No. 9502, (set forth in Appendix D). On May 7, 1975, Appellant was notified by letter (set forth in Appendix E), from Respondent DeMent, that his appointment had been rescinded. On May 19, 1975, the City Council took a second vote and readopted Resolution Number 9502 with an emergency clause. Appellant petitioned to the Superior Court of Pima County under a Special Action for a Writ of Mandamus, which

the Superior Court granted. Respondents herein appealed to the Court of Appeals on November 15, 1975. The Court of Appeals, pursuant to the Rules of the Supreme Court of Arizona, Rule 47 (e)(2), petitioned to transfer the appeal to the Supreme Court of Arizona on March 16, 1976. The Supreme Court of Arizona granted the petition for transfer on March 26, 1976. On November 29, 1976, the Supreme Court of Arizona handed down its decision reversing the judgment of the Superior Court. On January 4, 1977, a Petition for Rehearing was denied. Timely notice of appeal to this Court was filed in the Supreme Court of Arizona on March 7, 1977. (Set forth in Appendix I). Inasmuch as the Supreme Court of Arizona rejected Appellant's constitutional challenges to Resolution Number 9502 of the Tucson City

Council, Rule I, Mayor and Council Rules and Regulations, adopted pursuant to Tucson City Charter, Chapter IX, Sec. 4, and Tucson City Charter Chapter XI, Sec. 8, all ordinances considered "state statutes" for purposes of appeal, this matter is appropriately brought to this Court by appeal. See, eg., Zucht v King, 260 U.S. 174 (1922); Atlantic Coast Line Railway Company v. Goldsboro, 232 U.S. 548 (1912); Reinman v. Little Rock Arkansas, 237 U.S. 171 (1915); United States v. Ballin, 144 U.S. 1 (1841).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case specifically involves Resolution Number 9502 of the Tucson City Council adopted May 5, 1974 without an emergency clause and readopted May 19 with an emergency clause:

"RESOLUTION NO. 9502

RELATING TO APPOINTMENT OF CITY COURT MAGISTRATES: REPEALING RESOLUTION NO. 9496 OF THE MAYOR AND TUCSON CITY COUNCIL.

WHEREAS, on April 28, 1975, the Mayor and Council of the City of Tucson passed Resolution No. 9496 appointing a City Court magistrate,

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF

TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Resolution No. 9496 be and is hereby repealed.

~~SECTION 2. WHEREAS, it is necessary~~ for the preservation of the peace, health and safety of the City of Tucson that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its ~~passage and adoption~~.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1975."

This ordinance or resolution deprived Appellant of his rights to notice and an opportunity to be heard, in violation of his constitutional rights to due process and equal protection, prior to removal from his appointive office.

This case also involves Rule I, Mayor and Council Rules and Regulations adopted pursuant to Tucson City Charter Chapter IX, Sec. 4:

> "When a motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side on the same or succeeding meeting day to move for reconsideration thereof."

This ordinance or regulation allowing reconsideration of Appellant's appointment to the office of City Magistrate without notice to him or an opportunity to be heard violates his constitutional right to due process of law.

This case also involves Tucson City Charter Chapter XI, Sec. 8, which provides:

> "All ordinances, resolutions or franchises shall be signed by the Mayor and attested by the clerk, and transcribed in the proper books therefor, but no ordinance,

> resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city but no such emergency measure shall become immediately operative unless it shall state, in a separate section, the reasons why it is necessary that it should become immediately operative, and be approved by the affirmative vote of five-sixths of the council, taken by ayes and noes; provided further, that all ordinances and resolutions having the effect of ordinances or required to be published, except emergency ordinances and resolutions, shall be published at least three consecutive times in the official news-

paper of the city, and a copy thereof posted on a bulletin board in front of the City Hall, before they become effective and operative."

QUESTIONS PRESENTED

Does Resolution Number 9502 of the Tucson City Council repealing Appellant's appointment to the Office of City Magistrate of the City of Tucson, without either notice to Appellant or opportunity for Appellant to be heard violate the Due Process Clause of the Fourteenth Amendment?

Does Rule I, Mayor and Council Rules and Rules and Regulations (1968), adopted pursuant to Tucson City Charter Chapter IX, Sec. 4, which allows repeal of ordinances, franchises and resolutions, without notice or an opportunity to be heard as applied to resolutions removing City Magistrates, violate the Due Process Clause of the Fourteenth Amendment?

Does Tucson City Charter, Chapter XI, Sec. 8, allowing imposition of an emergency clause, in the resolutions appointing and removing City Magistrates, as applied to the facts of this case, violate the Equal Protection Clause of the Fourteenth Amendment?

S T A T E M E N T

Appellant, Joe Jacobson, was appointed to fill the vacancy created by the resignation of Judge Brashear, to the Office of City Magistrate on the 28th day of April, 1975, by the Tucson City Council, pursuant to the Tucson City Charter by Resolution No. 9496. Resolution No. 9496, passed by a vote of four to two, complied in all respects with the City Charter. Lewis C. Murphy Mayor of the City of Tucson, was absent from that meeting of the Council. On

May 1, 1975 Appellant was officially notified by letter, from the Clerk of the city, of his appointment. Appellant was ready, willing, and able to assume the position of City Magistrate and was eminently qualified having served as a Superior Court Judge and having a total of twelve and one-half years of judicial experience.

Seven days later, more specifically, May 5, 1975, the City Council, acting under the direction of Mayor Murphy, who had announced his displeasure with the Appellant's appointment, attempted to repeal and/or rescind Resolution No. 9496 by passage of Resolution No. 9502 with no emergency clause contained therein. The mayor and three council members voted in favor of the resolution; three councilmen voted against it. At this same meeting, the Council appointed Jean Williams to fill the vacancy created by Judge Brashear's resignation and Appellant's ostensible

removal. This was effected by Resolution No. 9503 (set forth in Appendix F), which had an emergency clause appended. On the 7th day of May, 1975, the City clerk notified Appellant by letter that his appointment as City Magistrate had been rescinded.

On the 19th day of May, 1975, the Mayor and Council re-passed and re-adopted Resolution No. 9502 by a six to one vote and appended an emergency clause.

On or about the 10th day of June, 1975, Appellant petitioned, in the Superior Court of the State of Arizona, in and for Pima County, for a Special Action and an Order To Show Cause why he should not be sworn to the office of City Magistrate. On October 6, 1975, the Superior Court granted Appellant's petition and ordered he be sworn to the office of City Magistrate within ten days.

On November 29, 1975 the Supreme Court of Arizona reversed the Superior Court's decision by a four to one decision with Vice Chief Justice Struckmeyer dissenting. A petition for rehearing was denied on January 4, 1977.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Petition for Special Action, Appellant alleged that:

"Said Resolution passed without giving notice to the petitioner or providing him with an opportunity to be heard, and that Petitioner was removed from office without cause all in contravention of Petitioner's right to due process and equal protection under the laws of the United States as embodied in 42 U. S. C. §§1981 and 1983 and the laws of the State of Arizona."

The petition further alleged:

"That the Respondents by passing Resolution Number 9502 have proceeded and are threatening to proceed without and in excess of jurisdiction and/or legal authority and that the said passage was arbitrary and capricious, contrary to law and a denial of procedural and substantive due process and equal protection of the law in that the city's legislative body cannot change by ordinance or resolution the organic law of a city, state... [or] the United States and that the city ordinances or resolutions must fall if they conflict with the city charter provisions."

The Petition was accompanied by a Memorandum of Points and Authorities which

dealt extensively with the due process and equal protection issues involved in the validity of Resolution Number 9502 and the means by which it was effectuated.

The Superior Court granted Appellant's Petition. In its findings of law, it stated:

> "That the Respondent's attempt to repeal and/or rescind Resolution Number 9496, in addition to being an illegal and meaningless act and in contravention of the City Charter of the City of Tucson, was a violation of Petitioner's JOE JACOBSON'S, right to due process of law, since it attempted to deprive Petitioner, JOE JACOBSON, of his right to hold the office of City Magistrate, without giving him notice of such act, the reasons therefore, or an opportunity to be heard." (R217-218, see also Appendix G.)

The Superior Court found further:

> "That having once been duly and legally passed, Resolution Number 9496 was beyond the jurisdiction and authority of the Mayor and City Council of the City of Tucson and their reconsideration of the same. (R216-217; see also Appendix G.)

As to the Equal Protection Question, the Superior Court found in its findings of law:

> "That Petitioner, JOE JACOBSON'S appointment as aforesaid became final and binding and when passed, Resolution Number 9496 removed said appointment from reconsideration by the Mayor and City Council of the City of Tucson."

The alleged unconstitutionality of Rule I, Mayor and Council Rules and Regulations (1968) and Tucson City Charter Chapter XI, Sec. 8, were sufficiently presented to and decided by the Superior Court to be ripe for review on appeal.

Appellant raised the constitutional issues in his brief at pages 52 to 63 in the section entitled

> "V. THE ATTEMPT OF THE MAYOR AND COUNCIL OF THE CITY OF TUCSON TO REMOVE JACOBSON FROM THE OFFICE OF CITY MAGISTRATE WITHOUT NOTICE, OPPORTUNITY TO BE HEARD, OR SPECIFIC LEGAL CAUSE VIOLATED JACOBSON'S RIGHT TO DUE PROCESS OF LAW."

The Appellant further stated:

> II. THE APPOINTMENT OF JACOBSON TO THE OFFICE OF CITY MAGISTRATE EFFECTED BY RESOLUTION NO. 9496 TOOK EFFECT IMMEDIATELY UPON THE

> PASSAGE OF RESOLUTION NO. 9496 ON APRIL 28, 1975, NOTWITHSTANDING THE FAILURE OF THE COUNCIL TO INCLUDE AN EMERGENCY CLAUSE IN THE RESOLUTION. (Appellee's Brief p. 24 to p. 30).

and further,

> "B. THE USE OF THE EMERGENCY CLAUSE TO ADOPT RESOLUTION NO. 9502 AND RESOLUTION 9503 WAS INEFFECTIVE AND JACOBSON'S APPOINTMENT WAS THUS VALID EVEN IF IT DID NOT TAKE EFFECT IMMEDIATELY."
>
> (Appellee's Brief P. 47 to P. 52).

On appeal, the Supreme Court of Arizona upheld the validity of Resolution Number 9502 and the Charter provisions involved therewith and impliedly held them constitutional. (See Supreme Court Opinion, Appendix A.) The court found that Appellant had no vested right in the office and that the removal procedure by repeal of

the resolution was proper. As to the Due Process question, the Supreme Court of Arizona, Justice Holohan writing the opinion, stated:

> "Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson Mayor and Council had full authority to reconsider the appointment as they would any type of resolution."

The court impliedly found no notice or opportunity to be heard was necessary prior to removal from office through repeal of the appointing resolution. As to the Equal Protection question, the Supreme Court of Arizona stated:

> "In City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), we ruled that the exercise of discretion by a city's legislature body in a

> determination of the existence of emergency is outside our scope of review." (558 P.2d at 690, Appendix A.)

The court refused to examine the facts which show manueverings and absence of changes in circumstances in the week time span between Appellant's appointment by resolution without an emergency clause and Jean Williams' appointment by resolution with an emergency clause.

Chief Justice Cameron and Justices Hayes and Gordon concurred, but did not write opinions.

Vice Chief Justice Struckmeyer dissented:

> "...from Marbury v. Madison [5 U.S. (1 Cranch) 137, 22 Ed. 60 (1803)] extending through a long line of cases, the rule has been

fixed that if a complete vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, a public body cannot rescind its vote or reconsider its action and select another person except in the manner lawfully permitted for removal." (558 P.2d 696, Appendix A.)

The dissenting opinion continued:

"An appointment is complete when the resolution providing for the appointment is finally passed 3 McQuillin, Municipal Corporations 392. That Jacobson could not enter into the performance of the duties of the office until May 28th because the operative date was postponed for the want of an emergency clause is of no moment. The appointment was final on April

28th and there was no power in the City Council to rescind the appointment. See Mansfield v. O'Brien 271 Mass 515, 171 N.E. 487 (1930); Morris v. Cashmore, 253 App. Div. 657, 3 NYS2d 624 (1938); State v. Miller, 620 Nis. St. 436, 57 N.E. 227, 78 Am.St. Rep. 732 (1900); State v. Tyrrell, 158 Wisc. 425, 149 N.W. 280 (1914). (558 P.2d 696; Appendix A.)

The opinion of the dissent recognizes that Appellant had a vested right which could be taken away only in accordance with the law and due process, and that Rule I of the Mayor and Council, Rules and Regulations (1968) allowing rescission of an appointing resolution without notice, hearing or cause, violates the Fourteenth Amendment of the Constitution of the United States.

A timely petition for rehearing was denied by the Supreme Court of the Arizona on January 4, 1977. Vice Chief Justice Struckmeyer voted in favor of granting the petition.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The opinion of the Supreme Court of Arizona upholding the validity of Resolution Number 9502 allowing Appellant's removal without notice and an opportunity to be heard violates the tenet that vested rights entitle their bearer to Due Process of the Law.

As construed by Arizona's highest court, Rule I of the Mayor and Council Rules and Regulations (1968) adopted pursuant to the City Charter of the City of Tucson, Chapter IX, Sec. 4 (1929), allows the City Council to

treat a resolution of appointment as a general resolution and rescind or repeal it prior to the time the appointee takes office. This encroachment upon the right to due process guaranteed by the federal constitution--on the basis of the "effective date" of the resolution and for political purposes-- raises serious questions under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Under the Supreme Court of Arizona's construction of the "emergency clause", it can be effectively used to discriminate without any rational basis in violation of the Equal Protection Clauses of the Fourteenth Amendment.

The issues raised in this jurisdictional statement are ripe for review in that the Appellant has been injured

and this Court has not yet ruled on the due process issues involved in the removal, without cause and as a result of political manuevering, of an appointed officer of a city through Resolution repealing or rescinding the appointment. The implications of Marbury v. Madison S.U.S. (1 Cranch) 137 (1830) and Arnett v. Kennedy, 416 U.S. 134 (1974) mandate this Court take jurisdiction of this appeal.

The issues on appeal are not moot. Appellant has pending in the Superior Court of Arizona, In and For Pima County, Case Number 160834, in which he is requesting damages for violations of his due process rights and for tortious interference with economic expectancy. The recovery in that case is conditioned, in part, in prevailing on appeal. Further, the issues are not moot

for they are capable of repetition yet evading review.

I.

RESOLUTION NUMBER 9502 AND RULE I, MAYOR AND COUNCIL RULES AND REGULATIONS (1968), ENACTED PURSUANT TO TUCSON CITY CHARTER, CHAPTER IX, SEC. 4, DENY APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS IN THE DEPRIVATION OF PROPERTY OR LIBERTY IN THE FORM OF PUBLIC OFFICE BY ALLOWING RECONSIDERATION AND RESCISSION OF APPOINTMENT TO OFFICE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.

This Court has long held that vested rights can be divested only in accordance

with due process of law, including notice and an opportunity to be heard. Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

This court has also recognized that there exists a point in time at which the power of an executive over an officer, not removeable at will, must cease. This point in time comes when the power of appointment has been exercised; that is, when the last act required of the executive has been performed. Marbury v. Madison, 1 Cranch (5U.S.) 49 (1803); United States v. Charles LeBaron, 19 How. (60U.S.) 73 (1856).

The rule derived from these cases is generally stated, as applied to municipal corporations:

"When a completed vote has been taken which results in the giving up of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person." 2 Dillion, Municipal Corporations (5th Ed) 3529. See also, 3 McQuillin, Municipal Corporations (3rd Ed.) 312.86, page 393.

Appellant was appointed to the Office of City Magistrate pursuant to Resolution Number 9496 which provides in pertinent part:

> "That Joe Jacobson be, and he hereby is, appointed as City Magistrate of the City of Tucson for the term commencing April 29, 1975 to and including April 28, 1977..."

This appointment was properly made under Tucson City Charter, Chapter V, Sec. 4.1.:

> "The... City Magistrate... shall be appointed by the Mayor and Council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor."

Appellant was validly appointed and entitled to office under the terms of both the charter and Marbury v. Madison, supra. Appellant was legitimatly entitled his office and due process requires that a person be given notice and a hearing before such entitlement is revoked. Peacock v. Board of Regents of the Universities and State Colleges of Arizona, 510 F.2d 1324 (9th Cir. 1975). In Arnett v. Kennedy, 416 U.S. 134 (1974)

this Court recognized the necessity of due process when legitimate entitlement is involved:

> "[W]here there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State and the administration of its law, that a person be given notice and a hearing before he is finally discharged." 416 U.S. at 135.

A valid expectancy arose in this case from the accepted practice in this state that an appointed officer has never been removed from office without cause. Cf., Perry v. Sinderman, supra.

The Appellees argued that the appointment was not effective under the terms of Tucson City Charter, Chapter

XI, Sec. 8, which provides:

> "No ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace . . . but . . .[only then, if an emergency clause is appended]."

The apparent conflict between the two charter provisions, Chapter V, Sec. 4.1 and Chapter IX, Sec. 8, must be reconciled so that the meaning and intent of the special provision dealing specifically with appointments controls over the general provisions. Kearney v. Mid-Century Co., 22 Ariz. App. 190, 526 P.2d 169 (1974); such immediate vesting of the interest in public office upon appointment is required by Marbury v. Madison, supra.

Inasmuch as Appellant was validly appointed City Magistrate and was duly notified of such appointment, a vested or legitimate expectancy interest necessarily arose. Board of Regents v. Roth, supra; Bishop v. Wood, 96 S.Ct.2074 (1976) Further, under the terms of Tucson City Charter, Chapter V, Sec. 4, provides that the terms of office is two years "unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor." The legal effect of such a provision is to make the person removeable for cause only. See P.A.A.C. v. Rizzo, 502 F.2d 306 (1974). See generally, annotation, Appointment to Office - Reconsideration, 89 ALR 132. The fact that a magistrate is removeable only for cause, gives the Appellant a greater interest and more protection than had a magistrate been terminable at will. Bishop v. Wood, supra;

Norton v. Blaylock, 285 F.Supp. 659 (1968); Keekow v. Village of Chenequa, 342 F. Supp. 494 (1972).

The Rule I, Mayor and Council Rules and Regulations (1968), giving the council power to reconsider and rescind an appointment to a public office without cause, violates the separation of powers. Meyers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935). To allow such reconsideration and rescission without notice and opportunity to be heard for the appointee would increase the political manipulation, partisan strife and corrupt bargaining of the executive branch. See e.g., State ex rel Pierce v. Hardin, 163 Tenn. 471, 4 S.W.2d 924 (1931).

II.

TUCSON CITY CHARTER CHAPTER XI, SEC. 8, WHICH ALLOWS IMMEDIATE APPOINTMENT AND EFFECTIVENESS OF APPOINTMENT IN CASES WHERE AN EMERGENCY IS FOUND TO EXIST BY THE COUNCIL AND A THIRTY DAY DELAY WHERE NO EMERGENCY IS FOUND TO EXIST DEPRIVES APPELLANT OF EQUAL PROTECTION OF THE LAWS AS APPLIED IN THIS CASE

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a state or municipal body in conferring benefits or imposing burdens must not be arbitrary, invidious or capricious. Gulf Colorado and Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897); Skinner v. Oklahoma, 316 U.S. 536 (1942); Baxstrom v. Herold, 383 U.S.

107 (1966). There can be no difference in the treatment among citizens unless there is a rational distinction between the classes affected. By this standard the application of Chapter XI, Sec. 8, of the Tucson City Charter is invidious, irrational and, therefore, unconstitutional. On April 28, 1975, the Appellant was appointed to office with no emergency clause being appended. On May 5, Appellant was removed from office by a reconsideration of the resolution appointing him. On that same day, by Resolution Number 9503, Ms. Jean Williams was appointed a City Magistrate to replace Appellant. Her appointment had an emergency clause appended. The situation and circumstances had not changed in the week time span so as to create an emergency. The facts of the case show that the need for the emergency clause was created by the

political manuevering of the City Council and was a sham designed to deprive Appellant of his constitutional right to due process. The City Council has used the emergency clause to discriminate against the Appellant with no rational basis; therefore, the Tucson City Charter, Chapter XI, Sec. 8, must be declared unconstitutional as applied to these facts.

C O N C L U S I O N

WHEREFORE, Appellant requests that this Honorable Court grant jurisdiction to determine the constitutional questions herein presented.

Respectfully submitted,

JOHNSON, HAYES & DOWDALL, LTD.

BY Richard J. Dowdall
RICHARD J. DOWDALL
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, RICHARD J. DOWDALL, one of the attorneys for JOE JACOBSON, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of March, 1977, I served copies of the foregoing Jurisdictional Statement For Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On the respondents, CITY OF TUCSON, et al., by hand delivering three (3) copies to their attorneys of record:

FREDERICK S. DEAN
Acting City Attorney

THOMAS J. WILSON
Assistant City Attorney
180 North Meyer
P. O. Box 27210 (85726)
Tucson, Arizona 85701

JOHNSON, HAYES & DOWDALL, LTD.

BY Richard J. Dowdall
RICHARD J. DOWDALL

APPENDIX A

OPINION OF SUPREME COURT OF ARIZONA

A P P E N D I X

APPENDIX A

SUPREME COURT OF ARIZONA
In Banc

NO. 12582

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

Filed November 29, 1976, Clifford H. Ward, Clerk Supreme Court.

Appeal from the Superior Court of Pima County, Cause No. 155294, The Honorable Gordon Farley, Judge. REVERSED.

HOLOHAN, Justice

The City of Tucson, its council, and mayor have appealed the judgment of the

superior court setting aside certain resolutions of the council and ordering that appellee Joe Jacobson be allowed to assume the office of city magistrate of Tucson. We assume jurisdiction pursuant to 17A A.R.S. Rule 47(e) (5), Rules of the Supreme Court.

The facts are not in dispute. On April 25, 1975 City Magistrate William Brashears advised the city council that he was resigning as magistrate effective May 2, 1975. Mr. Brashears had originally been appointed magistrate on April 9, 1973 for the usual two-year term. The city council had taken no action to extend or renew the term of Mr. Brashears prior to receiving his letter of resignation.

After receiving the letter of resignation the city council, on April 28, 1975, appointed, by resolution, Joe Jacobson to the office of City Magistrate for a term of

two years commencing April 29, 1975. An attempt to append an emergency clause to the resolution failed. At a meeting of the council held on May 5, 1975, a second resolution was passed which repealed the resolution of April 28th and voided the appointment of Jacobson. At a subsequent regular session of the council held on May 19, 1975, it was moved that the May 5th resolution be reconsidered for the purpose of attaching to it an amergency clause. The motion passed unanimously and the reconsidered resolution of repeal was passed and adopted with the inclusion of an emergency clause.

Appellee filed a petition for special action in the superior court, secured the judgment above referred to, and this appeal followed.

The primary issue in this case is the determination of when Mr. Jacobson's

appointment to the office of city magistrate became effective. Appellants argue that the original resolution of appointment did not become effective for thirty days because there was no emergency clause added to the resolution. Appellee maintains the resolution of appointment became effective on the date of its passage.

Prior to our determination of the primary issue we must consider appellants' threshold argument that a vacancy did not exist in the office of city magistrate. In support of their position, appellants cite provisions from the Tucson City Charter[1] and the Tucson City Code[2] which provide for

---

1. Chapter XII, Section 3 of the Tucson City Charter (1929), provides as follows: "There shall be at least <u>one</u> city magistrate appointed by the mayor and council who shall be judge of the city court. He shall hold office for a term of two years, or until his successor is appointed and qualified, unless sooner removed from office in the manner provided in this charter." (Emphasis supplied.)

(Continued on following page)

the establishment of one chief city magistrate and such assistants allowed by the mayor and council. It is therefore argued that as long as one position of chief city magistrate is filled there is no vacancy to be filled by the mayor and council. Appellees counter this argument with the contention that a vacancy in the city magistrate's office existed after the expiration of Mr. Brashears' two-year term on April 8, 1975. We do not agree with either of these arguments.

Under the Tucson City Charter the

Footnote continued

2. Chapter XIII, Section 8-2 of the Tucson City Code (1964) provides: "There shall be appointed a chief city magistrate and such other additional magistrates as determined by the mayor and council. The chief city magistrate shall be responsible for the administration of the city court. Each magistrate shall exercise all of the powers and duties of the city magistrate as provided by the Charter and Code of the city and the Constitution and laws of the State of Arizona in such case made and provided." (Emphasis supplied.)

the existence or nonexistence of an office vacancy is determined by Chapter VIII, Section 5 (1929), which provides:

> "A vacancy shall exist in any elective or appointive office, except under the recall provisions of this charter, when an officer fails to qualify within thirty days after commencement of his term, dies, resigns, removes from the city, absents himself continuously for thirty days from the duties of his office without the consent of the council, for two consecutive months, is incapacitated so that he is unable to attend to the duties of his office, is convicted of violating any of the provisions of this Charter, or of a felony, or is judicially declared a lunatic as defined by statute, or, in the office of councilman, when a member of the council is selected to fill

a vacancy in the office of mayor, as hereinbefore provided."

In the case before us Mr. Brashears continued to hold over in his office of city magistrate following his expired term of office. As previously set forth in Chapter 8, § 8-2 of the Tucson City Code (1964), the term of office for a city magistrate is "two years, or until his successor is appointed and qualified, unless sooner removed from office." (Emphasis supplied.) In its interpretation of very similar language in Article XXII, § 13 of the Arizona Constitution,3 this court has held that where an incumbent officer holds over following the expiration of his term the

---

3. Article XXII, § 13 of the Arizona Constitution provides:

> "The term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify."

office he holds is not vacant. McCall v. Cull, 51 Ariz. 237, 75 P.2d 696 (1938); Sweeney v. State, 23 Ariz. 435, 204 P. 1025 (1922). As was stated in Sweeney v. State, supra:

> ". . .(T)he additional term, though in its nature contingent and defeasible, is, while it exists, as much a part of the term of the incumbent as is his original, fixed, or regular term. Such incumbent is entitled to hold over after the expiration of his regular term, until the happening of both the events mentioned; i.e., the election of his successor and the qualification of such successor. During the period of the tenure as so extended the office will not become vacant, uless for causes which would create a vacancy in the fixed and regular term, such as the death,

resignation, removal, disqualification, or the like, of the incumbent." 23 Ariz. at 441.

At the time of passage of the original resolution of appointment on April 28, 1975, the office occupied by Mr. Brashears was not vacant. Although technically a vacancy did not exist in the office of city magistrate on April 28, 1975, the mayor and council could replace Mr. Brashears by appointing a new magistrate who would take office when qualified. As we shall point out, the new appointee could not qualify for the office until the mayor and council's appointment became effective.

Fundamental to the controversy before us is the point in time when the appointment of Mr. Jacobson became irrevocable and not subject to reconsideration or repeal. As Chief Justice Marshall enunciated in Marbury v Madison, 1 Cranch 137, 2 L. Ed.

60 (1803), the general rule is that an appointment is complete only after the performance of the last act required of the appointing power. See 3 E. McQuillin, "The Law of Municipal Corporations" § 12.86 (3rd Ed. 1968).

Pursuant to the Tucson City Charter, Chapter IX, Sec. 4 (1929):

"The mayor and council shall establish rules for their proceedings, and shall act only by resolutions or ordinance."

(Emphasis supplied.)

In compliance with this directive and the appointive authority given to the mayor and council by the Tucson City Charter Chapter V, Sec. 4 (1929), Mr. Jacobson's appointment to the office of city magistrate was implemented in the form of a resolution. The Tucson City Charter does not authorize the mayor and council to make appointments to city offices by any other method. We

view this resolution of appointment as the only correct manner which the mayor and council could use to implement their action.

All actions taken by the Tucson mayor and council do not become effective until thirty days after their passage unless accompanied by an emergency clause. Tucson City Charter Chapter IX, Sec. 8 (1929) provides that such officer "shall hold office for a period of two years from the date of each appointment." We do not believe the two provisions are either conflicting or inconsistent. We interpret the commencement date of the city magistrate's term as set forth in Chapter V, Sec. 4.1, supra, to be the effective date of an appointment and not necessarily the date upon which the appointive authority acted to make the appointment. Where a resolution of appointment contains an emergency clause the effective date will coincide

with the date of passage if the resolution so designates. Otherwise, an appointment is treated as all other resolutions and does not become effective for at least thirty days following its passage. Mr. Jacobson's appointment did not contain an emergency clause and therefore was not to be effective until thirty days after the mayor and council acted.

Having ruled that Mr. Jacobson's appointment was not to become effective for thirty days, we must now determine what effect subsequent actions by the Tucson mayor and council had on that appointment. We note that the mayor and council had, prior to the appointment now in question, adopted rules and regulations governing their proceedings pursuant to the Tucson City Charter, Chapter IX, Sec. 4, supra. Rule I of the Mayor and Council, Rules and Regulations (1968), provides that when a

motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side to move for reconsideration thereof on the same or succeeding meeting day. On May 5, 1975, the succeeding meeting day following Mr. Jacobson's appointment, the mayor and council took two separate actions by which they sought to void their resolution of appointment. First, the mayor and council voted, by separate resolution, to repeal Mr. Jacobson's appointment. Second, the mayor and council, in full compliance with their own Rule I, moved to reconsider their previous resolution of appointment.

Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson mayor and council had full authority to reconsider the appointment as they would any type of resolution. The appointment was recon-

sidered and denied by the mayor and council on May 5, 1975. As we have pointed out, the same resolution of appointment was also repealed on May 5, 1975. The repealing resolution was reconsidered on May 19, 1975, when an emergency clause was added giving effect to the repeal on that date. We recognize the cautious thoroughness exhibited by this dual action but we do not believe that it was necessary in this case. The reconsideration of the resolution of appointment on May 5, 1975, was sufficient to make that appointment immediately ineffective. The resolution of repeal and subsequent addition of an emergency clause were mere surplusage.

Appellee has argued that the emergency clause of May 19, 1975, is without effect because it is lacking in specificity and is not in compliance with the Charter requirement that reasons for the emergency be

stated separately. In City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), we ruled that the exercise of discretion by a city's legislative body in a determination of the existence of an emergency is outside our scope of review. We also note that since the repealer and emergency clause were surplusage we need not consider this argument. We therefore will not review the emergency clause determination made by the Tucson mayor and council.

Finally, appellee argues that the resolution of appointment of Mr. Jacobson has the force and effect of a contract and cannot be reconsidered.[4] Since we have

---

4. Subsection 4 of Rule I, Mayor and Council Rules and Regulations (1968) provides:

> "No matter approving a contract may be reconsidered after execution of the contract, unless the party to the contract has not yet acted thereon to his detriment."

ruled that the resolution of appointment was not effective for thirty days, there was no contract executed at the time Mr. Jacobson's appointment was reconsidered. The mayor and council were not prohibited from making that reconsideration.

Based upon the foregoing analysis we conclude that the reconsideration action taken by the Tucson mayor and council on May 5, 1975, made Mr. Jacobson's appointment ineffective as of that date.

Reversed.

WILLIAM A. HOLOHAN,
Justice

CONCURRING:

JAMES DUKE CAMERON, Chief Justice

JACK D. H. HAYS, Justice

FRANK X. GORDON, JR., Justice

STRUCKMEYER, Vice Chief Justice, dissenting:

I am unable to agree with the majority in their resolution of this case. The facts

are uncomplicated; the legal consequences elementary.

Appellee, Joe Jacobson, was appointed as City Magistrate for the City of Tucson by Resolution No. 9496 of the City Council on April 28, 1975. The resolution provided:

> "BE IT RESOLVED * * * (that) Joe Jacobson be and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing April 29, 1975 to and including April 28, 1977 * * *."

That the resolution was a present appointment, a complete and final enactment as of the time of its passage, April 28, 1975, cannot be doubted. While the operative date of the resolution was postponed for 30 days because it was not enacted as an emergency measure, the legal effect so far as Jacobson was concerned is that the commence-

ment of his duties and responsibilities was postponed for 30 days until May 28, 1975.

One week later, on May 5, 1975, the City Council by a 4 to 3 vote purported to rescind Resolution 9496 by the adoption of its Resolution 9502. At the same meeting, following the passage of Resolution 9502, the Council by the same vote adopted Resolution 9503 appointing a person other than Jacobson as City Magistrate. Thereafter, on May 19, a motion was made to reconsider Resolution 9502. This motion passed and Resolution 9502 was then re-adopted by a vote of 6 to 1 with an emergency clause.

The principle controlling here was early stated by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803):

> "Some point of time must be taken when the power of the executive over an officer, not removeable at his

will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed." 5 U.S. at 157.

From Marbury v. Madison, extending through a long line of cases, the rule has been fixed that if a complete vote has been taken which results in the giving of the necessary majority and plurality to one of the candidates, a public body cannot rescind its vote or reconsider its action and select another person except in the manner lawfully permitted for removal.

In Ekonomon v. Town of Milford, 21 Conn.Sup. 123, 145 A.2d 381 (1958), for example, eleven members of the town council voted the nomination and election of certain persons to membership on its urban rede-

velopment agency. The council had proceeded to other business when four councilmen who had not been present during the voting arrived at the meeting and asked to be allowed to vote on the membership of the agency. All fifteen members of the council voted to suspend the rules to permit the four members to vote and to add their votes to the previously announced totals, with the result that one person of those originally elected to membership was replaced by another person. The Connecticut court held:

"This court is of the opinion that the election or appointment in this case was made when the result of the first ballot was acertained and declared. Nothing more was required of the council to complete it. Its will had been expressed in a parliamentary and legal manner, had been duly de-

clared, and had become a matter of record. Nothing further was required by law. Mr. Chase's right to the office vested at once, and he might without further ceremony accept and qualify. Hall v. Inhabitants of Holden, 116 Mass. 172, 176; Montefiore Cemetery Co. v. Board of Com'rs of City of Newark, 130 A.730, 3 N.Y.Misc. 1100 1101; Marbury v Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60.

* * * * * * * *

* * * An appointment is complete when the last act required of the appointing power has been performed. This appointment is evidenced by an open, unequivocal act which, being the last act required from the person or body making it, necessarily excludes the idea of its being, so far as respects the appointment, an

inchoate and incomplete transaction. Some point of time must be taken when the power of the appointive power over an officer, not removable at will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person or body possessing the power has been performed. Marbury v. Madison, supra."

145 A.2d at 383-384.

An appointment is complete when the resolution providing for the appointment is finally passed. 3 McQuillan, Municipal Corporations 392. That Jacobson could not enter into the performance of the duties of the office until May 28th because the operative date was postponed for the want of an emergency clause is of no moment. The appointment was final on April 28th and

there was no power in the City Council to rescind the appointment. See Mansfield v. O'Brien, 271 Mass. 515, 171 N.E. 487 (1930); Morris v Cashmore, 253 App.Div. 657, 3 N.Y.S.2d 624 (1938); State v. Miller, 62 Ohio St. 436, 57 N.E. 227, 78 Am.St.Rep. 732 (1900); State v Tyrrell, 158 Wisc. 425, 149 N.W. 280 (1914). And see also "Reconsideration of appointment or confirmation of appointment to office", 89 A.L.R. 132 and authorities cited from 24 states that the appointment is final when the last act of the appointment body has been performed.

Appellants argue that a Tucson city magistrate may be removed from office without cause, and this is true. By Chapter 5, § 4.1 of the Tucson City Charter, the city post auditor, city attorney, city clerk and city magistrate hold their offices for two years unless removed by a vote of two-thirds of the Council "voting affirmatively

therefor." From this, appellants further argue that Resolution 9502 as passed and adopted on May 19, 1975 with the emergency clause making it effective immediately was an exercise of the authority provided in the City Charter to remove a magistrate.

Such argument is obviously specious. Resolution 9502 was to rescind Resolution 9496. There is not the slightest suggestion in Resolution 9502 that it purported to remove an existing city magistrate. It does not follow that the members of the City Council who voted to rescind the resolution of appointment, No. 9496, would for the same reason vote to remove or dismiss Jacobson as a city magistrate. In any event, they did not.

For the foregoing reasons, the judgment of the Superior Court of Pima County should be affirmed.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

APPENDIX B

RESOLUTION NUMBER 9496

APPENDIX B

Adopted 4/28/75
without emergency
clause
To become effective
5/28/75

ADOPTED BY
THE MAYOR
AND COUNCIL

April 28, 1975

RESOLUTION NO. 9496

RELATING TO CITY MAGISTRATE; APPOINTING JOE JACOBSON A CITY MAGISTRATE; FIXING HIS ANNUAL COMPENSATION.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Joe Jacobson be and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing April 29, 1975 to and including April 28, 1977, at an annual salary of Twenty-one Thousand Five Hundred and No/100 ($21,500.00) Dollars, together with cost of living increases and such additonal benefits, such as longevity pay or insurance, as are generally granted regular City employees from time to time during

said term.

~~SECTION 2. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, April 28, 1975.

/s/Rubin Romero
MAYOR
PRO-TEMPORE

ATTEST:

/s/ Donald DeMent
CITY CLERK

APPENDIX C

LETTER OF APPOINTMENT

APPENDIX C

CERTIFIED

May 1, 1975

Mr. Joe Jacobson
460 N. Silverbell
Tucson, Arizona

Dear Mr. Jacobson:

The Mayor and Council appointed you on April 28, 1975 as a City Magistrate of the City of Tucson, for a term commencing May 28, 1975. Attached is a copy of that Resolution for your information. Please contact this office at your convenience so that arrangements can be made to administer your Oath of Office.

Congratulations on your appointment and should you require additional information or assistance, please do not hesitate to contact this office.

Sincerely,

Donald L. DeMent
City Clerk

JMB

CITY CLERK'S NOTE: CERTIFIED MAIL #581177

APPENDIX D

RESOLUTION NUMBER 9502

APPENDIX D

Adopted 5/5/75
without emergency
clause
To become effective
6/4/75

ADOPTED BY
THE MAYOR
AND COUNCIL

May 5, 1975

RESOLUTION NO. 9502

RELATING TO APPOINTMENT OF CITY COURT MAGISTRATES; REPEALING RESOLUTION NO. 9406 OF THE MAYOR AND TUCSON CITY COUNCIL.

WHEREAS, on April 28, 1975, the Mayor and Council of the City of Tucson passed Resolution No. 9496 appointing a City Court magistrate,

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Resolution No. 9496 be and is hereby repealed.

~~SECTION 2. WHEREAS, it is neces~~sary for the preservation of the peace, health and safety of the City of Tucson that this resolution become immedidately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and ~~adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1975

/s/ Lewis C. Murphy
MAYOR

ATTEST:

/s/ Donald DeMent
CITY CLERK

(Seal)

APPENDIX E

LETTER OF RESCISSION

APPENDIX E

May 7, 1975

Mr. Joe Jacobson
460 N. Silverbell
Tucson, Arizona 85705

Dear Mr. Jacobson:

By action of the Mayor and Council on May 5, 1975, Resolution No. 9502 rescinded your appointment as a City Magistrate as previously established by Resolution No. 9406. A copy of the resolution accomplishing this action is attached for your information.

Should you have questions regarding this matter, please contact this office.

Sincerely,

Donald L. De Ment
City Clerk

ks
Enc. (1)

CITY CLERK'S NOTE: CERTIFIED MAIL #581152

APPENDIX F

RESOLUTION NUMBER 9503

Mayor Murphy: Mr. Clerk, without objection you are requested to read Resolution No. 9503 in full.

City Clerk Donald De Ment: RESOLUTION NO. 9503. RELATING TO CITY MAGISTRATE; APPOINTING JEAN WILLIAMS A CITY MAGISTRATE; FIXING HER ANNUAL COMPENSATION. BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:
SECTION 1. That Jean Williams be and she hereby is, appointed commencing May 6, 1975, to and including May 5, 1977.
SECTION 2. Her salary shall be Twenty-one Thousand Five Hundred and No/100 ($21,500.00) per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance as are generally granted regular City employees from time to time during said term.

Mr. Mayor, Section 3 is the normal emergency clause.

APPENDIX G

FINDING OF FACTS, CONCLUSIONS OF LAW, AND JUDGMENT OF THE SUPERIOR COURT

APPENDIX G

IN THE
SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

NO. 155294

JOE JACOBSON,

Petitioner,

vs

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson, DONALD L. DeMENT, City Clerk of the City of Tucson, RUBEN ROMERO, RICHARD J. KENNEDY, ROBERT C. CAUTHORN, EMMENT McLOUGHLIN, RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on regularly to be heard by the Court, sitting without a jury, the parties appearing by their respective counsels, and having submitted Memoranda of Points and Authorities, as well as Proposed Findings of Fact and Conclusions

of law, and the Court having reviewed same and the evidence, the Court does make its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. That prior to the 8th day of April, 1975, the Respondent, CITY OF TUCSON, had caused to be appointed and/or appointed five City Magistrates, each occupying a term of office as City Magistrate.

2. That on or about the 9th day of April, 1973, WILLIAM BRASHEAR was appointed one of the City of Tucson's City Magistrates, pursuant to the City Charter of the City of Tucson.

3. The term of the office of City Magistrate, WILLIAM BRASHEAR, terminated on the 8th day of April, 1975.

4. That City Magistrate, WILLIAM BRASHEAR, continued his tenure of office until his successor was duly appointed by

the City Council and Mayor, pursuant to the City Charter of the City of Tucson, which appointment took place on April 28th, 1975.

5. On the 28th day of April, 1975, the CITY OF TUCSON, acting by and through the City Council of the City of Tucson, the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, being absent, appointed the Petitioner, JOE JACOBSON, to fill the vacancy of the office of City Magistrate of the City of Tucson, which office had been occupied by WILLIAM BRASHEAR prior to the appointment of Petitioner, JOE JACOBSON.

6. On April 28th, 1975, the CITY OF TUCSON, acting by and through the City Council of the City of Tucson, and pursuant to the City Charter of the said City, appointed Petitioner, JOE JACOBSON, to a term of office as heretofore stated for a term commencing April 29th, 1975 to and including April 28th, 1977 by its Resolution

#9496, which Resolution did in all respects comply with and was pursuant to the City Charter of the City of Tucson.

7. That on or about May 1st, 1975, the Respondent, DONALD L. DeMENT, Clerk of the City of Tucson, by letter officially notified Petitioner, JOE JACOBSON, of his appointment as City Magistrate of the City of Tucson.

8. That Petitioner, JOE JACOBSON, is duly qualified to act as a City Magistrate of the City of Tucson.

9. That on or about the 5th day of May, 1975, and again on or about the 19th day of May, 1975, the CITY OF TUCSON, acting by and through the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, and Respondents City Councilmen attempted to repeal and/or rescind the above referred to Resolution #9496, by the passage of Resolution #9502.

10. That the Petitioner, JOE JACOBSON, was never given notice of the Respondents' attempt to pass or act on Resolution #9502.

11. On May 5th, 1975, and immediately following the said CITY OF TUCSON'S attempt to rescind and/or repeal Resolution #9496, as hereinabove set forth, the said Respondent, CITY OF TUCSON, acting by and through the Respondent, LEWIS C. MURPHY, Mayor of the City of Tucson, and certain City Councilmen of the City of Tucson, passed Resolution #9503, which Resolution appointed JEAN WILLIAMS as City Magistrate of the City of Tucson to fill the vacancy and term of office of WILLIAM BRASHEAR, which term had expired on or about April 9th, 1975.

12. That after the 5th day of May, 1975, the Respondents would not accept any oath of office that Petitioner, JOE JACOBSON, may have taken and any attempt by Petitioner, JOE JACOBSON, to take the oath

of office of City Magistrate of the City of Tucson, as provided by law, would have been a futile act by him even though he stood ready, willing and able to take the requisite oath.

13. On April 28, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9496 was passed by a vote of 4 to 2, without an emergency clause.

14. That on May 5, 1975, at a regular session of the Mayor and Council of the City of Tucson, Councilmember McLOUGHLIN, having voted on the prevailing side of the motion adopting Resolution No. 9496, moved to reconsider Resolution No. 9496.

15. That on May 5, 1975, at the regular session of the Mayor and Council of the City of Tucson, Resolution No. 9496 was reconsidered pursuant to the Rules and Regulations adopted by the Mayor and Council,

and defeated by a vote of 4 to 3.

16. That on May 5, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9502 was passed by a vote of 4 to 3.

17. That on May 19, 1975, at a regular session of the Mayor and Council of the City of Tucson, Resolution No. 9502, upon motion of Councilmember McLOUGHLIN, was adopted by a vote of 6 to 1, with the emergency clause.

18. That the Plaintiff, JOE JACOBSON, did not appear to take the oath of office until May 29, 1975.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the parties and the subject matter.

2. That Respondents' attempts to rescind and/or repeal the appointment of JOE JACOBSON as City Magistrate are null

and void and of no legal effect by reason of being in contravention of the City Charter of the City of Tucson and contrary to law.

3. That WILLIAM BRASHEAR'S term of office terminated by reason of the provisions of the City Charter of the City of Tucson, on April 8th, 1975.

4. That WILLIAM BRASHEAR'S tenure in office as City Magistrate of the City of Tucson continued, by reason of the City Charter of the City of Tucson, until his successor was duly appointed.

5. That Petitioner, JOE JACOBSON, was duly and legally appointed to the office of City Magistrate on April 28th, 1975, by reason of Respondents' Resolution #9496 and the said appointment terminated the tenure in office of City Magistrate, WILLIAM BRASHEAR.

6. That the City Charter of the City

of Tucson provides that the City Magistrate shall be appointed for a term of office of two years from the date of appointment.

7. That Resolution #9496 was legally passed by the acting Mayor and the City Council of Tucson, Arizona, on April 28th, 1975, and provided for the appointment of JOE JACOBSON as City Magistrate for a specific term and at a specific compensation and has the force and effect of a contract and the appointing body is precluded from reconsideration of same after its execution.

8. That the rescinding of the legal resolution of appointment as a City Magistrate by a Mayor and City Council does not amount to the act of removal of an appointed City Magistrate, which appointment is for a fixed term.

9. That by reason of the acts and conduct of Respondents, the Petitioner, JOE

JACOBSON, had no legal duty to submit his oath of office to Respondents or either of them.

10. That Petitioner, JOE JACOBSON'S appointment, as aforesaid, became final and binding and when passed, Resolution #9496 removed said appointment from reconsideration by the Mayor and City Council of the City of Tucson.

11. That having once been duly and legally passed, Resolution #9496 was beyond the jurisdiction and authority of the Mayor and City Council of the City of Tucson and their reconsideration of same.

12. That the Respondents' attempt to repeal and/or rescind Resolution #9496, in addition to being an illegal and meaningless act and in contravention of the City Charter of the City of Tucson, was a violation of Petitioner's, JOE JACOBSON'S, right to due process of law, since it attempted to

deprive Petitioner, JOE JACOBSON, of his right to hold the office of City Magistrate, without giving him notice of such act, the reasons therefore, or an opportunity to be heard.

DATED this 7th day of October, 1975, nunc pro tunc.

/s/ Gordon Farley
GORDON FARLEY
Judge of the Superior Court

APPENDIX H

DENIAL OF MOTION FOR REHEARING

APPENDIX H

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

January 5, 1977

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

Supreme Court
No. 12582

Pima County
No. 155294

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Vice Chief Justice Fred C. Struckmeyer,

voted to grant.

Mandate enclosed herewith.

CLIFFORD H. WARD, Clerk

by /s/ Mary Ann Hopkins
Deputy Clerk

TO: James D. Webb, Tucson City Attorney, P. O. Box 27210, Tucson, Arizona 85703 Attn: Thomas J. Wilson, Esq.
Richard J. Dowdall, Esq., Johnson, Hayes & Dowdall, 250 North Church Tucson, Arizona 85701
Hon. Gordon Farley, Judge, Santa Cruz County Superior Court, Santa Cruz County Courthouse, Nogales, Arizona 85621
Hon. Harry Gin, Presiding Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

dkb

APPENDIX I

NOTICE OF APPEAL

APPENDIX I

SUPREME COURT OF ARIZONA
In Banc

NO. 12582

CITY OF TUCSON, a body politic, Lewis C. Murphy, the Mayor of the City of Tucson, Donald L. DeMent, City Clerk of the City of Tucson, Ruben Romero, Richard J. Kennedy, Robert C. Cauthorn, Emmett McLoughlin, Rudy A. Castro and Barbara L. Weymann, Members of the City Council of the City of Tucson,

Appellants,

v.

JOE JACOBSON,

Appellee.

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that JOE JACOBSON, the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Arizona of January 4, 1977, denying rehearing on its judgment of November 29, 1976, holding that the removal was authorized and constitutional, thereby

reversing the decision of the Superior Court of Pima County holding that the removal of JOE JACOBSON from office under the applicable city ordiance was illegal and that he was entitled to be sworn for office.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

JOHNSON, HAYES & DOWDALL, LTD.

BY: /s/ Richard J. Dowdall
Richard J. Dowdall
Attorney for Joe Jacobson
Appellee

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

Certificate of Service

In accordance with Supreme Court Rule 33(1), service has been made on all parties by mailing a copy of the foregoing notice to:

James D. Webb
Tucson City Attorney

P. O. Box 27210
Tucson, Arizona 85703
ATTN: Thomas J. Wilson, Esq.

JOHNSON, HAYES & DOWDALL, LTD.

BY: /s/ Richard J. Dowdall
Richard J. Dowdall
Attorney for Appellee

Subscribed and sworn to before me this 7th day of March, 1977, by RICHARD J. DOWDALL.

/s/ Ann K. Weaver
Notary Public

MY COMMISSION EXPIRES:

8-16-78

(Filed March 8, 1977)

FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Thomas J. Wilson
CITY ATTORNEY'S OFFICE
City of Tucson
P. O. Box 27210
Tucson, Arizona 85726
(602) 791-4104

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Thomas J. Wilson
CITY ATTORNEY'S OFFICE
City of Tucson
P. O. Box 27210
Tucson, Arizona 85726
(602) 791-4104

INDEX

	Page
Opinion Below.	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Question Presented	3
Statement	6
Argument	11
I. THE CAUSE OF ACTION IS MOOT. . . .	19
II. THE DECISION BELOW IS BASED EXCLUSIVELY ON NON-FEDERAL GROUNDS.	21
III. THERE IS NO SUBSTANTIAL QUESTION OF FEDERAL LAW.	27
Conclusion	33
Certificate of Service	34
Appendices:	
Appendix A - Tucson City Charter, chap. V, sec. 4	A-1
Appendix B - Tucson City Charter, chap IX, sec. 8	B-1
Appendix C - Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.	C-1

INDEX - Cont'd

	Page
Appendix D - Resolution 9503	D-1
Appendix E - Ordinance 4665	E-1
Appendix F - 17A, A.R.S., Special Actions, Rules of Procedure, rule 1(a). .	F-1
Appendix G - Prayer for Relief, Appellant's Complaint, Superior Court, in and for the County of Pima, Arizona, June 23, 1975	G-1
Appendix H - Arizona State Constitution, Article XIII, sec. 2.	H-1
Appendix I - Tucson City Charter, chap. V, sec. 2	I-1

TABLE OF CASES

	Page
Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969)	23
Alejandrino v. Quezon, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926)	21
City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968)	12
City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951)	5, 24
City of Tucson v. Walker, 60 Ariz. 232, 135 P.2d 223 (1943)	12
Durley v. Mayo, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956)	23
Equitable Life Assurance Co. v. Brown, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902)	30
Kiekow v. Village of Chenequa, 342 F.Supp. 494 (1972)	23
Lane v. Hayes, 90 S.E.2d 270 (1955)	23
Maloney v. Condon, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709 (1903)	21
Marbury v. Madison, 1 C. 137, 2 L.Ed. 60 (1803)	25
Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293	21
Norton v. Blaylock, 285 F.Supp. 659 (1968)	23

TABLE OF CASES - Cont'd

	Page
Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390, 72 S.Ct. 11, 96 L.Ed. 47 (1951)	32
Seaboard Airline R.Y. v. Padgett, 236 U.S. 668, 36 S.Ct. 481, 59 L.Ed. 777 (1915)	32
Security Mutual Life Ins. Co. v. Prewitt, 200 U.S 446, 26 S.Ct. 314, 50 L.Ed. 545 (1906)	21
State v. Norby, 165 P.2d 302 (1946)	23
Stewart v. Kansas City, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915)	32
Strode v. Sullivan, 72 Ariz. 360, 236 P.2d 48 (1951)	12
U.S. v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321, 334 (1891)	17
Williamson v. Wannamaker, 48 S.E.2d 601 (1948)	21
Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922)	32

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
United States Constitution, Amendment XIV	4,27
Arizona State Constitution, Article XIII, sec. 2	12
Arizona Revised Statutes, Vol. 17A, Special Actions, Rules of Procedure rule 1(a)	10
Tucson City Charter	
Chap. V, sec. 2	13
Chap. V, sec. 4	3,7,13
Chap. IX, sec. 4	3,7,13
Chap. IX, sec. 8	2,13
Tucson City Ordinance 4665	9,20
Tucson City Resolution 9496	7,8,15, 16,19
Tucson City Resolution 9502	4,8,10, 16,18
Tucson City Resolution 9503	9,20
Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.	8

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal in the above entitled matter be dismissed on the grounds that the cause is moot and that the judgment of the Arizona Supreme Court is based exclusively upon non-federal grounds.

In the alternative, the Appellees move that the judgment of the Arizona Supreme Court be affirmed on the ground that, if a federal question exists in this matter, the question is so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the Arizona Supreme Court (App. A of Jurisdictional Statement) is reported at _____ Ariz. _____, 558 P.2d 686 (1976).

JURISDICTION

The jurisdictional requisites are set forth in the Appellant's jurisdictional statement. The Appellees, however, are unsure whether or not the matter is properly brought before the Court on appeal rather than certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Many of the pertinent provisions of the Tucson City Charter, the ordinances thereto and the rules and regulations governing the proceedings of the mayor and council of the City of Tucson are set forth in the Appellant's jurisdictional statement; however, the following provisions are also necessarily considered in any determination of this matter:

Tucson City Charter, chap. IX, sec. 8 (erroneously cited by Appellant

as: Tucson City Charter, chap. XI, sec. 8, Jurisdictional Statement, p. 7, but properly set forth therein).

Tucson City Charter, chap. V, sec. 4, provides:

> The city post auditor, city attorney, city clerk and city magistrate, hereinafter in this Charter designated "post auditor", "attorney", "clerk" and magistrate", respectively shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

Tucson City Charter, chap. IX, sec. 4, provides:

> The mayor and council shall establish rules for their proceedings and shall act only by resolution or ordinance.

QUESTION PRESENTED

The Appellant has alleged that the decision of the Arizona Supreme Court

raises three questions. The first question as asserted by the Appellant is whether or not resolution 9502 of the City of Tucson repealing the Appellant's appointment to the office of city magistrate denies him due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision of the Arizona Supreme Court specifically did not address the efficacy or propriety of the mayor and council's action in passing resolution 9502. The Arizona Supreme Court determined that the passage of resolution 9502 was "unnecessary and mere surplusage." (Jurisdictional Statement, App. A at A-14) The Appellees, therefore, maintain that there can be no question as to the effect or propriety of resolution 9502.

A second question raised by the Appellant relates to the validity of an

emergency provision added to a resolution appointing a city magistrate which serves to make an action immediately effective. Once again the decision of the Arizona Supreme Court did not address the propriety of the addition of an emergency clause to a resolution of appointment. In fact, the Supreme Court's judgment reviewed its previous decision of City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), and affirmed that decision stating that:

> ...the exercise of discretion by a city's legislative body in a determination of the existence of an emergency is outside the scope of review. We also note that since the repealer and emergency clause were surplusage, we need not consider this argument.
> (Jurisdictional Statement, App. A, A-15)

The Appellees, therefore, maintain that there can be no question before the Court relating to the imposition of an emergency clause upon a resolution of

appointment by the mayor and council of the City of Tucson.

The Appellees assert that the only question properly brought before the Court relates to the validity of the reconsideration of an appointment to the office of city magistrate by the mayor and council of the City of Tucson. The only question which the Appellees believe might be properly framed is: Does the mayor and council of the City of Tucson, pursuant to the Tucson City Charter, ordinances and the rules and regulations governing the conduct of their proceedings, possess the power to reconsider a resolution of appointment to the office of city magistrate and defeat it prior to its effective date?

STATEMENT

This litigation concerns the appointment of a magistrate to a position in the city court of the City of Tucson

by the mayor and council of the City of Tucson, Arizona. Prior to April 26, 1975, five magistrates occupied positions in the city court of the City of Tucson. On April 26, 1975, one of the magistrates submitted a letter of resignation from his position to be effective on May 2, 1975.

Responding to this resignation, the mayor and council, pursuant to their appointive authority, Tucson City Charter, chap. V, sec. 4 (set forth in App. A) considered on April 28, 1975, resolution 9496 proposing the appointment of the Appellant as a city magistrate. By a vote of four to two, one member being absent, resolution 9496 was passed, to be effective in thirty days. Tucson City Charter, chap. IX, sec. 8 (set forth in App. B).

On May 5, 1975, the mayor and council of the City of Tucson convened in regular session, all members present.

At this time, pursuant to Rule I of the Rules and Regulations adopted by the mayor and council to govern the conduct of their proceedings (set forth in App. C), one of the councilmen who had voted on the prevailing side of the motion adopting resolution 9496 moved to reconsider the resolution. Resolution 9496 was reconsidered and defeated by a vote of four to three.

In addition to having appropriately reconsidered resolution 9496, the mayor and council on May 5, 1975, also passed resolution 9502 which provided for the repeal of resolution 9496.

Resolution 9502 was not passed by a sufficient vote to make it immediately effective; however, on May 19, 1975, the next regular session of the mayor and council, resolution 9502 was reconsidered and passed and adopted by a vote sufficient to make it effective immediately.

By these two actions the mayor and council of the City of Tucson considered and rejected the Appellant as city magistrate of the City of Tucson.

On May 5, 1975, by resolution 9503 the mayor and council of the City of Tucson appointed Jean Williams to the position of city magistrate filling the position created by the resignation. This appointment was effective immediately for a term of office commencing May 6, 1975, to and including May 7, 1977 (resolution 9503 set forth in App. D).

Jean Williams served her entire term and held over as city magistrate of the City of Tucson until July 6, 1977, at which time her successor assumed the office with a term commencing on July 6, 1977, to and including July 5, 1979, as reflected in ordinance 4665 (set forth in App. E).

On or about June 10, 1975, the Appellant filed and served in the Superior

Court of the State of Arizona, in and for Pima County, a Complaint in Special Action and an Order to Show Cause why he should not assume the office of city magistrate. Under the rules of procedure in Arizona, all previously designated special writs have been unified in common action known as a special action through which relief in the nature of mandamus, prohibition, certiorari may be sought. 17A, A.R.S., Special Actions, Rules of Procedure, rule 1(a)(set forth in App. F). The Appellant in his complaint in the Superior Court sought relief in the nature of mandamus, seeking to have the court declare resolution 9502 "null and void and of no legal effect in that it is repugnant to and in violation of the City Charter of the Respondent, CITY OF TUCSON, and a violation of due process of law..." (Appellant's prayer for relief, Complaint in Special Action, Superior Court, Pima

County, Arizona, set forth in App. G).

On October 6, 1975, the Superior Court, in and for Pima County, granted the Appellant's prayer for relief. The Appellees appealed the Superior Court decision with the Arizona Supreme Court assuming jurisdiction. On November 29, 1976, the Arizona Supreme Court reversed the Superior Court's decision and denied a petition for rehearing on January 4, 1977.

ARGUMENT

The decision of the Arizona Supreme Court is clearly correct. Although the Appellant asserts that the case involves the questions of notice and due process, the singular issue is the authority possessed by the mayor and council of the City of Tucson in relation to their power to make appointments to the position of

magistrate of the city court of the City of Tucson.

Article XIII, sec. 2, of the Arizona State Constitution authorizes home rule charters for municipalities of a certain size (set forth in App. H). The fundamental purpose of this provision is to free such cities from state legislative control and invest in them sovereignty in all areas, especially those areas of municipal concern where the power to be exercised is specifically or impliedly granted by their charters. City of Tucson v. Walker, 60 Ariz. 232, 135 P.2d 223 (1943); accord, Strode v. Sullivan, 72 Ariz. 360, 236 P.2d 48 (1951). The organic law of the City of Tucson, therefore, is established by its city charter and the ordinances thereto. The City's governing body possesses those powers which are provided by charter and ordinances. City of Scottsdale v. Superior Court, 103 Ariz.

204, 439 P.2d 290 (1968). The Tucson City Charter has provided for the manner in which the mayor and council shall act in executing their legislative and executive duties.

Chap. IX, sec. 4, of the Tucson City Charter provides:

> The mayor and council shall establish rules for their proceedings and shall act only by resolution or ordinance.

The Tucson City Charter, chap. IX, sec. 8, provides in pertinent part that:

> ...No ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city, but no such emergency measure shall become immediately operative unless it...shall be approved by an affirmative vote of five-sixths of the council.

Chapter V, sec. 2, of the Tucson City Charter designates the appointive officers of the city which includes magistrates of the city court (set forth

in App. I).

Tucson City Charter, chap. V, sec. 4, provides in relevant portion:

> The city..."magistrate",... shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appoinment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

Thus, the mayor and council, by specific provision of the Tucson City Charter, possess the authority to appoint city magistrates. Further, that authority has been extended to reserve to the council the absolute right of removal conditioned only by the requirement that, for removal to occur, there must be a two-thirds affirmative vote of the council.

The mayor and council executed a resolution, to be effective thirty days after its passage, appointing the Appellant to a position as city magistrate. In absolute compliance with the rules governing

its procedure, the mayor and council subsequently reconsidered the resolution and defeated it.

The Arizona Supreme Court, interpreting the power and authority of the mayor and council in relation to the Tucson City Charter, ordinances thereto and the rules and regulations promulgated by the mayor and council to govern its proceedings, held that the action taken by the mayor and council was appropriate. In reaching their decision the Arizona Supreme Court answered two questions. The first question was: What was the effective date of resolution 9496? The second question addressed was: Could the mayor and council reconsider and defeat resolution 9496?

The Arizona Supreme Court ruled that:

> All actions taken by the Tucson mayor and council do not become effective

> until thirty days after their passage unless accompanied by an emergency clause.
> (Jurisdictional Statement, App. A at A-11)

Resolution 9496 did not contain an emergency clause and thus was not effective immediately. The Arizona Supreme Court then reviewed the mayor and council's rules which govern their proceedings and determined:

> Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson mayor and council had full authority to reconsider the appointment as they would any type of resolution.
> (Jurisdictional Statement, App. A at A-13)

The Arizona Supreme Court thus ruled that the act of reconsideration was appropriate and specifically did not addresss the mayor and council's additional action in repealing the resolution 9502, calling that act surplusage.

This Court has consistently held that the judiciary possesses a limited authority to review and adjudicate matters which relate to the rules which govern legislative proceedings. In this regard, the Court, in U. S. v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321, 334 (1891), stated:

> Neither do the advantages or disadvantages, the wisdom or folly, of...a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of methods are open to the determination of the house and no impeachment of the rule to say that some other way would be better, more accurate or even more just.

The Arizona Supreme Court sustained

in the mayor and council the unequivocal authority and power, established by the organic law of the City of Tucson, to reconsider a resolution of appointment. The Arizona Supreme Court decision, therefore, is a determination of the authority vested in the mayor and council of the City of Tucson. The judgment did not reach constitutional issues nor did it substantively consider, as the Appellant asserts, the repeal of resolution 9502.

The Appellant brought his action in special action before the Superior Court in and for the County of Pima, Arizona. That action sought relief by way of mandamus compelling the Appellees to swear the Appellant as a city magistrate. The action did not request relief as to damages nor assert any collateral claim.

The Appellant's appeal should be set aside for the reason that the matter

has now, by the passage of time, become moot; and for the further reason that, were the matter at this time not moot, the decision of the Arizona Supreme Court soundly rests on non-federal grounds. Additionally, the Appellees maintain that if a federal question lies in this litigation, it is so frivolous and unsubstantial so as to preclude review.

I

THE CAUSE OF ACTION IS MOOT.

The passage of time has rendered any cause of action which might be brought before the Court moot. Resolution 9496 would have established a term of office for the Appellant commencing April 29, 1975, to and including April 28, 1977. The Appellant's appointment was, however, denied; and another party was appointed to the position in the city court with a term of office commencing on May 6,

1975, to and including May 5, 1977 (see resolution 9503, App. D). That appointee, Jean Williams, served that term of office and held over until July 6, 1977, whereupon her successor duly appointed by the mayor and council of the City of Tucson assumed the office (see ordinance 4665, App. E).

The mere lapse of time has brought about the expiration of the subject matter of this suit. The original proceeding in this matter was one seeking an order in the nature of a writ of mandamus compelling the Appellees to allow the Appellant to be sworn as a city magistrate. There is no ability for the Court, at this time, to grant any effective relief. The term of office which the Appellant sought has expired. Another party effectively served that term of office, and a successor has been appointed in relation to that position in the city court. There simply

is no longer a term of office to which to restore the Appellant. Such a passage of time unquestionably renders this matter moot. Alejandrino v. Quezon, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926); Maloney v. Condon, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709 (1903); Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed 293 (1895); cf. Security Mutual Life Ins. Co. v. Prewitt, 200 U.S. 446, 26 S.Ct. 314, 50 L.Ed. 545 (1906).

II

THE DECISION BELOW IS BASED EXCLUSIVELY ON NON-FEDERAL GROUNDS.

The Supreme Court of Arizona based its decision in this matter upon the interpretation of the authority and power vested in the mayor and council of the City of Tucson to reconsider an appointment to the office of city magistrate. In that relation the Court considered

the matter of the appointing authority, the office to which the appointment was to be made and the effect of the executive action taken to effect such an appointment. The Court soundly based its decision upon precedence in the Arizona law and upon the interpretation and analysis of the actions of the mayor and council of the City of Tucson.

The Arizona Supreme Court did not address a federal issue, but founded its decision upon its determination that the power and authority to act as the mayor and council of the City of Tucson acted clearly exist by provisions of the Tucson City Charter, the Tucson City ordinances and the rules and regulations promulgated by the mayor and council to govern its proceedings. The Appellant has not shown that the decision is not firmly based upon appropriate state grounds as is necessary in order to invoke the jurisdiction of

the Court. Durley v. Mayo, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956).

Furthermore, the grounds upon which the Arizona Supreme Court based its decision are certainly broad enough to sustain its judgment. The Arizona Supreme Court has previously held it to be the rule in Arizona that a public office does not create a property or contract right in the holder. Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969). Such a rule has been similarly recognized in other jurisdictions, both state and federal. See Kiekow v. Village of Chenequa, 342 F.Supp. 494 (1972); Norton v. Blaylock, 285 F. Supp. 659 (1968); Williamson v. Wannamaker, 48 S.E.2d 601 (1948); Lane v. Hayes, 90 S.E.2d 270 (1955); contra, State v. Norby, 165 P.2d 302 (1946). Yet, the Arizona Supreme Court did not even reach such a question for its decision was based upon the specific authority granted the mayor

and council by Charter, ordinances and their rules and regulations.

The decision analyzed the propriety and validity of the mayor and council's rules and regulations adopted to govern its proceedings. Additionally, the Arizona Supreme Court reviewed its own prior decision relating to the judiciary's consideration of legislative bodies authority to immediately enact legislation through the use of emergency power. In so doing, the Arizona Supreme Court reexamined and affirmed its decision in City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951). It is clear that the decision of the Arizona Supreme Court rests firmly upon non-federal grounds which unquestionably sustain and support its judgment.

Although a separate federal question might hypothetically lie in this matter, the Arizona Supreme Court's decision

exists independently of any such issue. The decision never addressed a federal question.

The Appellees must further note that the decision of the Arizona Supreme Court is inherently valid and tenable. The provisions of the Tucson City Charter, and the ordinances thereto, invest in the mayor and council the authority to appoint and to remove certain officers, including city magistrates. Where there is a coexistence of the power to appoint and the subsequent power to remove at will, there can be no practical cessation of the executive's power over the office holder. Where the power to remove an office holder at will and without cause exists, there can be no vesting in the office holder of any property, contract or constitutional right to the office. This issue was the central issue in Marbury v. Madison, 1 C. 137, 2 L.Ed 60 (1803). As Chief Justice

Marshall expressed in Marbury (1 C. at 157):

> Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. [Emphasis added.]

Where the officer is, however, removable at the will of the executive, as herein, then Marshall stated (1 C. at 162):

> ...the circumstance which completes his appointment is of no concern, because the act is at any time revocable...

In this circumstance, the mayor and council had the clear authority to not only reconsider its decision but at any point subsequent to remove the appointee from office conditioned only upon the existence of sufficient votes to effect such removal. Therefore, the Arizona Supreme Court's decision is a clear, unequivocal interpretation of statutory provisions establishing authority and power in the mayor and council of the City of Tucson to have acted as they did, and the decision does

not reach or answer any federal question asserted by the Appellant.

III

THERE IS NO SUBSTANTIAL QUESTION OF FEDERAL LAW.

The Appellant contends that his cause of action frames a substantial question for the Court's consideration. The Appellant is not able, however, to reference that federal question within the judgment of the Arizona Supreme Court, nor in fact is there a substantial or significant question of federal law.

The Appellant urges that he was denied constitutional guarantees by the reconsideration of his appointment to the city court of the City of Tucson and further that the act of the mayor and council of the City of Tucson in repealing the resolution posing the appointment is repugnant to the Fourteenth Amendment of the

the Constitution of the United States. At the very best, the Appellant is arguing a question of form over substance, and the Arizona Supreme Court never addressed such issues.

In the first instance, the power and authority of the mayor and council of the City of Tucson are defined and established by the Tucson City Charter and the ordinances thereto. The Tucson City Charter and relevant ordinances invest in the mayor and council the power to appoint city magistrates, while also reserving the power to remove city magistrates without notice and without cause upon the mere condition that two-thirds of the council vote affirmatively for such action. Thus, clearly the appointing authority has also had reserved unto it the absolute authority to remove a city magistrate, without cause, without notice, at any time.

As was even noted in the dissenting opinion of the Arizona Supreme Court,

> Appellants argue that a Tucson city magistrate may be removed from office without cause and this is true.
> (Jurisdictional Statement, App. A at A-23)

Since removal without cause has been reserved to the city council, there could be no challenge whatsoever in relation to constitutional guarantees of due process if a magistrate was removed from office. Clearly then the argument that the appointing authority, who can also remove without cause, can not, however, reconsider an appointment prior to its effective date is specious.

The decision of the Arizona Supreme Court ruled that the rules and regulations promulgated by the mayor and council of the City of Tucson governing their proceedings provided for reconsideration on any act which had

not become effective, if such reconsideration was accomplished according to the procedures defined in the rules.

The mayor and council followed its rules and regulations in reconsidering the appointment of the Appellant and, therefore, there can be no substantial federal question before the Court existing by the claim that the action of reconsideration denied the Appellant his rights of due process. Merely alleging a federal question is insufficient to invoke the jurisdiction of the Court. There must be a real and substantial federal question. Equitable Life Assurance Co. v. Brown, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed 190 (1902).

It must also be noted that the entire matter is of narrow and limited importance relating only to the parties. In light of the reservation of power to remove at will in the council, a question

of reconsideration prior to the effective date of appointment creates a narrow question, the result of unique and clearly rare circumstances. If it were the circumstance that the rules and regulations governing the proceedings of the mayor and council had not provided for reconsideration of the resolution, the council still possessed the unquestioned power to remove the Appellant from the office, without notice and without cause. The extensive action by the mayor and council clearly emphasizes their change of attitude concerning the appointment of the Appellant, and thus without the power to reconsider, it seems clear the council simply would have removed the Appellant; or as they in fact did, pass a resolution repealing their former action.

A federal question, if it exists herein, is not substantial enough or broad enough, to merit or warrant the consideration of the Court. The Appellees urge that

any possible federal question existing in this matter is essentially devoid of all merit and frivolous and, therefore, cannot justify consideration by the Court. Seaboard Airline R.Y. v. Padgett, 236 U.S. 668, 36 S.Ct. 481, 59 L.Ed. 777 (1915). It is submitted that any issue herein is more form than substance and therefore cannot warrant review. Stewart v. Kansas City, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915).

Due to such deficiencies, there exists cause for dismissal of the appeal. Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922); Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390, 72 S.Ct. 11, 96 L.Ed. 47 (1951).

CONCLUSION

WHEREFORE, it is respectfully submitted that the Appellant, for the numerous reasons argued, has presented no viable basis for a decision of the Court, and that this matter should be dismissed or, in the alternative, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

CITY ATTORNEY'S OFFICE
CITY OF TUCSON

By Thomas J. Wilson
Thomas J. Wilson
Assistant City Attorney
Attorney for Appellees

CERTIFICATE OF SERVICE

I, THOMAS J. WILSON, one of the attorneys for the CITY OF TUCSON, et al., appellees herein, and an applicant for membership to the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of July, 1977, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto, as follows:

On the appellant, JOE JACOBSON, by hand delivering three (3) copies to his attorneys of record:

RICHARD J. DOWDALL
Johnson, Hayes & Dowdall, Ltd.
250 North Church Avenue
Tucson, Arizona 85701

CITY ATTORNEY'S OFFICE
City of Tucson

By Thomas J. Wilson
Thomas J. Wilson
Assistant City Attorney

APPENDIX A

Tucson City Charter
Chap. V, sec. 4

The city post auditor, city attorney, city clerk and city magistrate, hereinafter in this Charter designated "post auditor", "attorney", "clerk" and "magistrate", respectively shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

APPENDIX B

Tucson City Charter
Chap. IX, sec. 8

All ordinances, resolutions or franchises shall be signed by the mayor and attested by the clerk, and transcribed in the proper books therefor, but no ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city; but no such emergency measure shall become immediately operative unless it shall state, in a separate section, the reasons why it is necessary that it should become immediately operative, and be approved by the affirmative vote of five-sixths of the council, taken by ayes and noes; provided, further, that all ordinances and resolutions having the effect of ordinances or required to be published, except emergency ordinances and resolutions, shall be published at least three consecutive times in the official newspaper of the city, and a copy thereof posted on a bulletin board in front of the City Hall, before they become effective and operative.

APPENDIX C

Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.

I. Reconsideration

1. When a motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side, on the same or succeeding meeting date to move for the reconsideration thereof.

2. A member on the prevailing side, on the same or succeeding meeting day, may file his intention to move for reconsideration on a given date.

3. The motion to reconsider is agreed to by majority of those voting, even when the vote reconsidered requires a greater vote for affirmative action. But a motion to reconsider, having been acted on, another motion to reconsider is not in order without unanimous consent.

4. No matter approving a contract may be reconsidered after execution of the contract, unless the party to the contract has not yet acted therein to his detriment.

APPENDIX D

Resolution 9503

ADOPTED BY THE
MAYOR AND COUNCIL

May 5, 1975

RESOLUTION NO. 9503

RELATING TO CITY MAGISTRATES; APPOINTING JEAN WILLIAMS A CITY MAGISTRATE; FIXING HER ANNUAL COMPENSATION.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Jean Williams be and she hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing May 6, 1975, to and including May 5, 1977.

SECTION 2. Her salary shall be TWENTY-ONE THOUSAND FIVE HUNDRED and NO/100 Dollars ($21,500.00) per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance, as are generally granted regular City employees from time to time during said term.

SECTION 3. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1977.

/s/ L. C. Murphy
Mayor

ATTEST:

/s/ Donald L. DeMent
City Clerk

APPROVED AS TO FORM:

/s/ J. Webb
City Attorney

APPENDIX E

Ordinance 4665

Adopted JUN 06 1977
without emergency clause
To become effective
JUL 06 1977
In accordance with Ch. IX
Sec. 8 of Tucson City
Charter

ADOPTED BY THE
MAYOR AND COUNCIL

JUN 06 1977

ORDINANCE NO. 4665

RELATING TO CITY MAGISTRATES; APPOINTING WILLIAM W. BRASHEAR CITY MAGISTRATE; FIXING HIS ANNUAL COMPENSATION.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That William W. Brashear be, and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing July 6, 1977, to and including July 5, 1979.

SECTION 2. His salary shall be TWENTY-THREE THOUSAND ($23,000.00) DOLLARS per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance, as are generally

granted regular City employees from time to time during said term.

~~SECTION 3. WHEREAS, it is necessary~~ for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this ordinance become immediately effective, an emergency is hereby declared to exist, and this ordinance shall be effective immediately upon its passage and ~~adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, JUN 06 1977.

/s/ L. Murphy
MAYOR

ATTEST:

/s/ Donald L. DeMent
CITY CLERK

APPROVED AS TO FORM:

/s/ F. S. Dean
CITY ATTORNEY

NWL/cr
6-3-77

APPENDIX F

17A, A.R.S. Special Actions,
Rules of Procedure, rule 1(a)

Rule 1. Nature of the Special Action

(a) Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus or prohibition is neither necessary nor proper. Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition.

APPENDIX G

Prayer for Relief, Appellant's Complaint, Superior Court, in and for the County of Pima, Arizona, June 23, 1975

WHEREFORE, your Petitioner prays the Court to enter an Order to Show Cause directed to the Respondents, ordering them to appear at a date and time certain to show cause, if any they have, why the Court should not enter the following Orders:

1. Its Order declaring Resolution #9502 to be null and void and of no legal effect in that it is repugnant to and in violation of the City Charter of the Respondent, CITY OF TUCSON, and a violation of due process of law, and

2. Its Order ordering the Respondents to expunge from the records of the Respondent, CITY OF TUCSON, Resolution #9502, and

3. Its Order of Finding of Fact and Conclusions of Law, pursuant to Rule 6 of the Rules of Procedure for Special Actions.

APPENDIX H

Arizona State Constitution
Article XIII, sec. 2

Section 2. Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the State, in the following manner:...

APPENDIX I

Tucson City Charter
Chap. V, sec. 2

The appointing officers of the city shall be:

(1) City manager;
(2) City finance director;
(3) City post auditor;
(4) City attorney;
(5) City magistrate;
(6) City engineer;
(7) Superintendent of the water department;
(8) Superintendent of streets;
(9) City clerk;
(10) Chief of police;
(11) Fire chief;
(12) Director of parks and recreation;
(13) Members of the library board;
(14) Members of the civil service commission; and
(15) Such other officers as from time to time may be provided for by ordinance.

Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Countil of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Richard J. Dowdall
JOHNSON, HAYES & DOWDALL, LTD.
250 North Church Avenue
Tucson, Arizona 85701
(602) 624-8741

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Countil of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

OPPOSITION TO MOTION
TO DISMISS OR AFFIRM

Richard J. Dowdall
JOHNSON, HAYES & DOWDALL, LTD.
250 North Church Avenue
Tucson, Arizona 85701
(602) 624-8741

TABLE OF CONTENTS

	Page
OPPOSITION TO MOTION TO DISMISS OR AFFIRM	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
QUESTIONS PRESENTED	5
STATEMENT OF FACTS	7
ARGUMENT	7
THE CAUSE OF ACTION IS NOT MOOT	9
THE DECISION OF THE ARIZONA SUPREME COURT IS NOT BASED ON A SUFFICIENT AND SUBSTANTIAL INDEPENDENT STATE GROUND	14
THE CASE PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW	21
CONCLUSION	25
APPENDIX A	A-1

TABLE OF CASES

Page

Ahearn v. Bailey, 104 Ariz. 250, 451 P. 2d 30 (1969).....18,24

Arnett v. Kennedy, 416 U. S. 134 (1974).....23

Atherton Mills v. Johnson, 259 U. S. 13 (1922).....10

Bishop v. Wood, ____ U.S.____, 96 S. Ct. 2074 (1976).....8,24,25

Board of Regents v. Roth, 408 U. S. 564 (1972).....23

City of Boston v. Jackson, 260 U. S. 309 (1922).....23

City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P. 2d 1011 (1951).....19

City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P. 2d 290 (1908).....8

City of Tucson, et al v. Joe Jacobson, ____ Ariz.____, 558 P. 2d 686 (1976).....2

Erznoznik v. City of Jacksonville, 422 U. S. 805 (1975).....4

Giles v. Harris, 189 U. S. 475 (1903).....12

Page

Hodges v. Snyder, 261 U. S. 600 (1923).....22

Humphrey's Executor v. United States, 272 U. S. 52 (1926).....23,24

Johnson v. Risk, 137 U. S. 300 (1890).....16

Joint Anti Fascist Committee v. McGrath, 341 U. S. 183 (1951).....23

Kearney v. Mid-Century Co., 22 Ariz. App. 190, 526 P. 2d 169 (1974).....17

Lerner v. Casey, 357 U. S. 468 (1958).....4

Marbury v. Madison, 5 U. S. (1 Cranch) 137 (1803).....20,23

Milheim v. Moffat Tunnel Improvement District, 262 U.S. 710 (1923).....22

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P. 2d 472 (1967).....10

Muskrat v. United States, 219 U. S. 346 (1911).....10

Perry v. Sinderman, 408 U. S. 593 (1972).....24

Poe v. Ullman, 367 U. S. 497 (1961).....9

Page

San Mateo v. Southern Pacific Railway Co., 116 U. S. 138 (1885).....10

Stembridge v. State of Georgia, 343 U. S. 541 (1952)...14,23

Terminiello v. City of Chicago, 337 U. S. 1 (1949).....4,22

United States v. Ballin, 144 U. S. 1 (1891).....8

Wiley v. Sinkler, 179 U. S. 58 (1900).....13

Wisconsin v. Constantineus, 400 U. S. 33 (1971).....23

Zucht v. King, 260 U. S. 174 (1922).....4

Sweeny v. State, 23 Ariz. 435, 204 P. 1025 (1922).....A-1

TABLE OF CONSTITUTIONAL AND
STATUTORY PROVISIONS

Page

FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION.....2,4

28 U.S.C. §1257(2).....2

28 U.S.C. §1257(3).....3

28 U.S.C. §2103.....3

TUCSON CITY CHARTER,
Chapter VIII, §6.....A-1

TUCSON CITY CHARTER,
Chapter VIII, §5.....A-2,
A-3

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Countil of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

OPPOSITION TO MOTION
TO DISMISS OR AFFIRM

Richard J. Dowdall
JOHNSON, HAYES & DOWDALL, LTD.
250 North Church Avenue
Tucson, Arizona 85701
(602) 624-8741

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, pursuant to Rule 16(d)(4) of the Revised Rules of the Supreme Court of the United States, opposes Appellees' Motion to Dismiss the appeal in the above entitled matter and alleges that jurisdiction in this case is proper on the grounds that the cause is not moot and that the judgment of the Arizona Supreme Court is not based on such a substantial and sufficient independent state ground so as to preclude review of the federal questions involved.

Appellant also opposes Appellees' Motion to Affirm the judgment of the Arizona Supreme Court on the ground that a substantial federal question exists under constitutional precedent so as to warrant further argument.

Additionally, in the event it is determined that United States Supreme Court review is appropriate through certiorari and Appellees' Motion to Dismiss or Affirm is deemed an Opposition to Petition for Certiorari, Appellant contends that Appellant has established his burden under Rule 19 in that special and important reasons for granting the writ exist. The decision below involves an important question of federal law which has not been, but should be, settled by this Court. The Arizona Supreme Court incorrectly held that the Findings of Fact and Conclusions of Law of the trial court, establishing entitlement to office and a violation of Due Process and Equal Protection, were erroneous.

OPINION BELOW

The opinion of the Arizona Supreme Court is reported at 113 Ariz. 534, 558 P. 2d 686 (1976).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as

an appeal from the Arizona Supreme Court's decision upholding, against Due Process and Equal Protection attack, the validity of Tucson City Ordinances allowing reconsideration and/or rescission of appointment to the office of City Magistrate. Alternatively, Appellant has requested that the Court deem the Jurisdictional Statement a "Petition for Writ of Certiorari" pursuant to 28 U.S.C.§2103 on the basis that a title, right or privilege arising under the Constitution of the United States was specially claimed in the trial court action as is required for certiorari by 28 U.S.C. §1257(3).

Appellate jurisdiction of this Court is proper as to a city ordinance, deemed a state statute, where its validity has been assailed as unconstitutional and which has been held constitutional by a decree of the highest state court in

which a decision could be had. Erznoznik v. City of Jacksonville, 422 U. S. 205 (1975); Terminiello v. City of Chicago, 337 U. S. 1 (1949); Zucht v. King, 260 U. S. 174 (1922). Appellant challenged the application of the ordinances and procedural rules of the Tucson City Council on Separation of Powers, Due Process, and Equal Protection grounds.

Jurisdiction as either appeal or certiorari depends on the characterization of the primary issues in the case. In Lerner v. Casey, 357 U. S. 468, 469 (1958), a similar case dealing with 14th Amendment rights which arose from dismissal of a subway conductor under New York's Security Risk Law, the Court indicated that characterization is the key and is within the Court's inherent power:

> "We consider that the constitutional questions before us relate primarily,

and more substantially, to the propriety of the findings made by appellees rather than to the validity of the provisions of the Security Risk Law. Accordingly, we think it the better course to dismiss the appeal, and to treat the papers as a petition for certiorari, which is hereby granted. 28 U.S.C. §2103."

The United States Supreme Court has jurisdiction of this case regardless of the characterization of the facts and issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are set out in the Jurisdictional Statement and in Appellees' Motion to Dismiss or Affirm.

QUESTIONS PRESENTED

The questions Appellant asserts are in issue are fully set forth in Appellant's Jurisdictional Statement. The

questions can be condensed into two basic questions:

Do the ordinances and/or procedural rules purporting to give the Mayor and Council of the City of Tucson power to reconsider or rescind an appointment to the office of City Magistrate after both an affirmative vote of appointment has been taken and notice of appointment to the appointee has been given, violate the Due Process and Equal Protection Clauses of the United States Constitution when considered in light of the necessity for separation of the legislative and judicial branches of government?

Did the acts of the Mayor and Council in repealing, rescinding or reconsidering the appointment without notice, hearing, and opportunity to be heard violate Appellant's Due Process and Equal Protection rights?

STATEMENT OF FACTS

The facts of the case are fully set forth in Appellant's Jurisdictional Statement. Appellees' Statement of Facts omit the important facts of notice of appointment, as required by ordinance, which was given to Appellant prior to any reconsideration by the Council, and, of acts and statements by the Mayor designed to overpower or influence the Council to reconsider, rescind or repeal Appellant's judicial appointment.

ARGUMENT

Reduced to its logical conclusion, Appellees' argument is that the City of Tucson, as a municipality of the state, under home rule, is free to act under its charter without regard to Constitutional requirements of Due Process, Equal Protection and Separation of Powers. Appellant admits that the city is organized under a

charter and that it possesses power to act under the charter and ordinances, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P. 2d 290 (1968), but the powers must be exercised within the bounds of the Constitution. Bishop v. Wood, ____ U. S. ____, 96 S. Ct. 2074 (1976). In United States v. Ballin, 144 U. S. 1, 5, (1891), the Court stated:

> "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights ...".

The City is required to conduct its business within the confines of the Constitution of the United States and the amendments thereto.

THE CAUSE OF ACTION IS NOT MOOT

The passage of time has not rendered this cause of action moot. The concept of mootness in Supreme Court decisions fails of a concise definition. It is a concept designed to promote the constitutional requirements that a case or controversy exist. In Poe v. Ullman, 367 U. S. 497, 503-504 (1961), the court stated:

"The various doctrines of 'standing', 'ripeness', and 'mootness', which this court has evolved with particular, though not exclusive, reference to such cases are but several manifestations each having its own 'varied application'- of the primary conception that federal judicial power is to be exercised to strike down legislation. . . only at the instance of one who is immediately harm-

ed. . .by the challenged action [cases cited herein omitted]."

The court noted further:

"This principle was given early application and has been recurringly enforced in the court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims."

Id at 505.

A case is moot only when there is no longer an existing cause of action between the parties. San Mateo v. Southern Pacific Railway Co., 116 U. S. 138 (1885); Muskrat v. United States, 219 U. S. 346 (1911); Atherton Mills v. Johnston, 259 U. S. 13 (1922). Arizona recognizes the mootness doctrine. In Mueller v. City of Phoenix, 102 Ariz. 575, 583, 435 P. 2d 472

(1967), the court stated "a question is not moot if it seeks to determine an abstract problem which does not arise upon existing facts or rights". The cause of action is not moot under any acceptation of the law.

The action originated as a mandamus action to determine Appellant's entitlement to office and to compel the Clerk of the City of Tucson to swear the Appellant to office. The term of office to which Appellant was appointed expired April 28, 1977; however, the issue of entitlement to office is still alive and is the basis for further litigation between the Appellees and Appellant in Action No. 160834 in the Superior Court of the State of Arizona in and for the County of Pima wherein Appellees are defendants. In that case, Appellant is plaintiff and prays for damages arising from this incident for

breach of employment contract, and for interference with property and liberty interests without Due Process and Equal Protection of law. The Appellant and Appellees have a pecuniary interest in the outcome of this appeal because the Arizona Supreme Court decision will be res judicata to issues in the damages case.

In Giles v. Harris, 189 U. S. 475 (1903), a case requesting a mandatory injunction to place Appellant, a negro, on the voting register, the court stated:

> "This election has gone by so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill of the appeal on that ground, because to be enabled to cast a vote in that election is not, as in Mills v. Green, 159 U. S. 651,

657, 60 L.ed 293, 295, 16 Sup. at Rep. 132, the whole object of the bill. It is not even the principal object of relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903."

The objective of Appellant in bringing the mandamus action was more than just being sworn to office, it was to receive the benefits accruing to one holding such an office. This Court has recognized "that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation on money." Wiley v. Sinkler, 1790 S. 58. The case is not moot.

THE DECISION OF THE ARIZONA SUPREME COURT IS NOT BASED ON A SUFFICIENT AND SUBSTANTIAL INDEPENDENT STATE GROUND

The general principle as to Supreme Court review of State court decisions is found in Stembridge v. State of Georgia, 343 U. S. 541, 547 (19):

"It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision on the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L.ed. 476; Lynch v. New York,

293 U. S. 52, 55 S. Ct. 16, 79 L.ed 191 and where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it. Klinger v. Missouri, 13 Wall. 257, 263, 20 L.ed 635; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 297, 11 S. Ct. 622, 624, 49 L.ed 990; Lynch v. New York, supra. ... But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, 'it will be presumed that State court based its judgment on the law raising the federal question, and this court will

then take jurisdiction.' Klinger v. Missouri, supra, 13 Wall at p. 263, 20 L.ed 635; Johnson v. Risk, 137 U. S. 300, 307, 11 S. Ct. 111, 113, 34 L.ed. 683; Lawrence v. State Tax Commission, 286 U. S. 276, 282-283, 52 S. Ct. 556, 558, 76 L.ed 1102." (emphasis added).

The Arizona Supreme Court decision does not rest upon a good, valid, sufficient substantial and independent state ground. Johnson v. Risk, 137 U. S. 300 (1890). The Court based its decision on a strained and erroneous interpretation of the Tucson City Charter, Arizona precedent, Supreme Court precedent, and Constitutional law.

In finding that the appointment was not effective or vested immediately, the Court cited no Arizona case law and failed to give credence Tucson City Charter,

Chapter V §4.1, which provides

> "the ... city magistrate ... shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment unless sooner removed. ..". (emphasis added).

Pursuant to the charter, the vacancy in the magistrate's office also caused the appointment to vest immediately. See, Appendix A.

Further, the court refused to acknowledge the fact that notice was sent to Appellant and that the rules of statutory construction require a specific provision to control over a general provision. Kearney v. Mid-Century Co., 22 Ariz. App. 190, 526 P. 2d 169 (1974). The court, in disregarding precedent and constitutional considerations as discussed in the Jurisdictional Statement, pages 18-22, found no vesting of Appellant's interest in office and concluded that he was removable at will. The court further found that no contract of employment existed so that re-

consideration of the appointment was proper. Appellees contend that the decision was correct and cite the Arizona case of Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969) for the proposition that a public office does not create a property or contract right in the holder. Ahearn holds exactly the opposite. Mr. Ahearn was a member of The Industrial Commission whose office was abolished by an act of the State legislature. In Ahearn, the court was careful to distinguish between removal of an incumbent and the abolition of an office. The case deals strictly with, and holds narrowly that, an office holder has no right to compel the continuation of an office. The court stated "It has sometimes been said that the legislature may abolish the office not not the officer." Id at 254. The case in fact supports Appellant's contention that he

had a right to the office and that the Separation of Powers doctrine mandates that the City Council not be able to unseat an incumbent judge at will.

The Arizona Supreme Court further based its decision of the vesting question on the case of City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P. 2d 1011 (1951). The Landrum case dealt with a parking lease entered into by the City of Phoenix and an independent contractor who was to build a 400 car parking garage pursuant to Ordinance No. 5295 which was passed with an emergency clause that failed to fulfill the charter requirements that the existence and reasons of the emergency be stated separately. The court did not discuss the effectiveness of ordinances with or without the emergency clause. The court hold narrowly that "the determination by

the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary." This case does not deal with appointive judicial offices. Further, the case does not hold, as Appellees would have this Court believe, that the emergency clause provisions apply to legislative appointments of judicial officers to delay effectiveness of appointment for thirty days in their absence. This case also does not involve conduct of the Council taking inconsistent stances as to the same set of facts and circumstances.

The Arizona Supreme Court decision cites Marbury v. Madison, 1 Cranch 137, 2 L.ed 60 (1803) but fails to recognize the import of the case that the office vests upon appointment even where delivery of the appointing papers is not made. If the appointment was not effective immed-

iately, the only thing lacking to make the appointment effective was the passage of time, so that the appointment was vested.

The Arizona Supreme Court decision is not based upon a substantial independent state ground and is untenable under the charter provisions, precedent, and constitutional law. The appeal must be granted because there exists no non-federal basis for the decision.

THE CASE PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW

The Appellant herein has contended at all times that the provisions allowing reconsideration of a motion do not apply to him and that as appointee to the judicial branch of government such reconsideration without notice, opportunity to be heard and cause violated the Separation of Powers doctrine and his Due Process and Equal Protection rights. This chal-

lenge of the constitutionality of an ordinance as construed and applied presents a substantial federal question. Terminiello v. City of Chicago, 337 U. S. 1 (1949). The Appellees allege that such a question is form rather than substance. As in Terminiello, the "pinch" of the ordinance or charter provision is in its application.

A substantial and nonfrivolous federal question exists where an issue is presented which requires analysis and exposition for its decision. Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710, 716-717 (1923). The questions presented here are not "so wanting in substance as not to need further argument." Hodges v. Snyder, 261 U. S. 600 (1923). The fact that the State court decision does not address the federal question involved does not preclude this Court from taking jurisdiction of this appeal. See,

Stembridge v. State of Georgia, supra, and cases citing it.

Generally, a case has no "substantial" federal question if in light of prior decisions no argument is warranted. City of Boston v. Jackson, 260 U. S. 309 (1922). Appellant submits that need for analysis and argument makes this case substantial in light of the cases involving appointment to, and removal from, office including Marbury v. Madison, supra, Humphrey's Executor v. United States, 295 U. S. 602 (1935), Myers v. United States, 272 U. S. 52 (1926), and the recent line of cases involving Due Process right to protection of property and liberty interests, Joint Anti Fascist Committee v. McGrath, 341 U. S. 183 (1951), Wisconsin v. Constantineus, 400 U. S. 33 (1971), Board of Regents v. Roth, 408 U. S. 564 (1972), Arnett v. Kennedy, 416 U. S. 134

(1974) and Bishop v. Wood, supra.

The analysis of this case is as follows:

1) Appellant was appointed for a two-year term of office as magistrate by Resolution No. 9496. Under state law and constitutional considerations of Separation of Powers and Due Process, that office vested immediately in the Appellant. Appellant was not merely "an employee" of the Mayor and City Council, he was a member of the judicial branch and on a co-equal basis with them. See Ahearn v. Bailey, supra, citing Humphrey's Executor v. United States, supra.

2) Appellant was notified of his appointment which created a protectible expectancy, at the very least. See Perry v. Sindermann, 408 U. S. 593 (197), wherein the court stated that a "person's interest in a benefit is a 'property interest for

due process purposes if there are ... rules or mutually explicit understandings that support his entitlement to the benefit'".

3) Appellant's appointment's reconsideration, rescission or repeal was a matter of public record, was at the behest of the Mayor who made comments derrogatory to Appellant's name and reputation as a lawyer and judge, and was done without notice, hearing, or an opportunity to be heard.

This case presents a substantial federal question and fits within the requirements for review and relief set forth in Bishop, v. Wood, supra. The appeal must be granted and probable jurisdiction noted.

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY SUBMITTED that the Appellees' Motion to Dismiss the appeal or Affirm the judgment

must be denied on the grounds that the question is not moot, is not based on a sufficient independent state basis, and presents a substantial federal question.

Respectfully Submitted,

JOHNSON, HAYES & DOWDALL, LTD.

By Richard J. Dowdall
Richard J. Dowdall
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, RICHARD J. DOWDALL, one of the attorneys for JOE JACOBSON, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of August, 1977, I served copies of the foregoing Opposition to Motion to Dismiss or Affirm on the several parties thereto, as follows:

On the Appellees, CITY OF TUCSON, et al, by hand delivering three (3) copies to their attorneys of record:

FREDERICK S. DEAN
Acting City Attorney

THOMAS J. WILSON
Assistant City Attorney
180 North Meyer
Tucson, Arizona 85701

JOHNSON, HAYES & DOWDALL, LTD.

By Richard J. Dowdall
Richard J. Dowdall

APPENDIX A

APPENDIX A

Tucson City Charter, Chapter VIII, §6, provides:

> "In the event of a vacancy in office, the appointing power or authority shall immediately, or within such time as expressly provided in this charter, fill the vacancy, which, in the event of offices for a term, shall be for the remainder of the term."

The trial court found that a vacancy existed in the office of city magistrate upon Brashear's resignation. The Arizona Supreme Court cited Sweeny v. State, 23 Ariz. 435, 204 P. 1025 (1922) for the proposition that no vacancy existed by virtue of Brashear's holding over in office. The Arizona Supreme Court failed to give effect to Brashear's letter of resignation. Sweeny actually supports Appellant's position that a vacancy existed and that the appointment vested immediately.

The court stated:

> "Such incumbent [Brashear in our case] is entitled to hold over after the expiration of his regular term, until the happening of both the events mentioned, i.e., the election of his successor and the qualification of such successor. During the period of the tenure as so extended the office will not become vacant, unless for causes which would create a vacancy in the fixed and regular term, such as the death, resignation, removal, disqualification, or the like of the incumbent.

Clearly, the Arizona Supreme Court's reliance on Sweeny to prove no vacancy existed is erroneous.

A vacancy existed under Tucson City Charter, Chapter VIII, §5:

"Sec. 5. When vacancies exist.

"A vacancy shall exist in any elective or appointed office, except under the recall provisions of this charter, when an officer fails to qualify within thirty days after commencement of this term, dies, resigns, removes from the city, absences himself continuously for thirty days from the duties of this office without the consent of the office, for two consecutive months is inconpacitated so that he is unable to attend to the duties of his office, is convicted of violating any of the provisions of this charter, or of a felony, or is judicially declared a lunatic as defined by statute, or, in the office of the councilmen, when a member of the council is selected to fill a vacancy in the office of mayor, as hereinbefore provided." (Emphasis supplied).